Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

JOSLYN MANUFACTURING COMPANY,

Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAY A. CANEL
Counsel of Record
STEPHEN D. DAVIS
CANEL, DAVIS & KING
Attorneys for Petitioner
10 South LaSalle Street
Suite 3400
Chicago, Illinois 60603
(312) 372-4142

5982
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

55 pp

QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit violate the *Erie* doctrine by failing to apply Louisiana law? Did the court abuse its discretion by refusing to certify the question before it knowingly applied a rule which Louisiana courts do not?

In 1988, the Fifth Circuit predicted the Louisiana Supreme Court would hold that, when a liability insurance policy requires the insured to give immediate notice of a claim as a "condition precedent" to coverage, the insurer can avoid coverage even though it suffered no prejudice from the delay in notice. *MGIC, infra.*

The Fifth Circuit admitted in this case that the Louisiana Supreme Court had rejected *MGIC's* "condition precedent" approach in *Jackson, infra,* a case the *MGIC* court failed to cite or discuss. Louisiana's high court held that whether the insurer suffered prejudice was an important factor in all delayed notice cases. Louisiana intermediate appellate decisions following *Jackson* have held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds.

But the Fifth Circuit held it was bound by *MGIC,* and denied petitioner's motion to certify. The application of the Fifth Circuit's "condition precedent" rule resulted in the forfeiture of petitioner's liability insurance for a $13 million environmental clean-up on account of a delay in notice which the insurance company admits caused it no harm.

The Louisiana Department of Insurance filed an *amicus* brief in support of petitioner's suggestion for rehearing *en banc.* It stated that the Fifth Circuit had failed "to follow the law and well-established jurisprudence of Louisiana. . ." and that the "Department of Insurance is concerned that foreign insurers will

seek to use the federal courts as a convenient forum to defeat claims on hypertechnical grounds which would not be cognizable in state courts. . ." The suggestion for rehearing was denied.

The simplest method of assuring that *Erie* is complied with, and that Louisiana law is correctly applied, is to certify the question to the Louisiana Supreme Court.

Petitioner respectfully requests the Court to grant *certiorari* and vacate and remand for reconsideration of the motion to certify. *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

LIST OF ALL PARTIES TO THE PROCEEDINGS

Joslyn Manufacturing Company

Liberty Mutual Insurance Company

RULE 29.1 LISTING

Petitioner Joslyn Manufacturing Company is a wholly owned subsidiary of Joslyn Corporation, a publicly held and traded corporation with outstanding securities in the hands of the public. Affiliates include other subsidiaries of petitioner's parent corporation, being Joslyn Clark Controls, Inc., Joslyn Canada Inc., Joslyn Hi-Voltage Corporation, Joslyn Electronic Systems Corporation, Joslyn Power Products Corporation, Joslyn Research and Development Corporation, ADK Pressure Equipment Corporation, Sunbank Family of Companies, Inc., Sunbank Electronics, Inc., Air-Dry Corporation of America, Joslyn Foreign Sales Corporation, Joslyn Jennings Corporation, Jennings Land Co., Joslyn Foundation and Joslyn Sierra Corp.

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No.

In The

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October Term, 1994

JOSLYN MANUFACTURING COMPANY,

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vs.

LIBERTY MUTUAL INSURANCE COMPANY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Joslyn Manufacturing Company v. Liberty Mutual Insurance Company, 30 F.3d 630 (5th Cir. 1994), reproduced herein as Appendix A; and *Joslyn Manufacturing Company v. Liberty Mutual Insurance Company,* 836 F. Supp. 1273 (W.D. La. 1993), reproduced herein as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on September 2, 1994. A suggestion for rehearing *en banc* filed by petitioner was denied on September 30, 1994, and the order is reproduced herein as Appendix C. This Court has jurisdiction to issue the requested writ of certiorari under 28 U.S.C. § 1254(1).

Subject matter jurisdiction in the district court was pursuant to 28 U.S.C. § 1332. Petitioner Joslyn is a Delaware corporation with its principal place of business in Chicago, Illinois. Respondent Liberty is a Massachusetts corporation having its principal place of business in Boston, Massachusetts. The amount in controversy exceeds $50,000 exclusive of interest and costs.

CONSTITUTIONAL PROVISION INVOLVED

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X. *See Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

STATEMENT OF THE CASE

A. Factual Background

This is an action for declaratory judgment and damages. Petitioner purchased comprehensive general liability insurance coverage from Liberty Mutual Insurance Company ("Liberty")

for its wood treatment plant in Bossier City, Louisiana from the plant's purchase in 1950 until its sale in 1969. Liberty refused to defend or indemnify petitioner against Louisiana Department of Environmental Quality ("DEQ") orders directing petitioner and others to investigate and remediate environmental damage at the site. Petitioner seeks reimbursement of past defense costs, indemnity of its past clean-up costs and a declaration that Liberty must pay its future defense and clean-up costs.

On August 2, 1986, the DEQ issued a compliance order "finding that Joslyn [petitioner] and twelve other parties were subject to liability for clean-up and remedial costs. . ." App. A, 2a-3a. However, the order merely asked the parties "to submit a letter to the DEQ stating whether [they] would voluntarily investigate and remediate the contamination at the property." *Id.*, 3a. The order was "stayed because of requests for hearing." *Id.*

Petitioner sent the stayed August 2, 1986 order to Liberty on May 19, 1987. On June 23, 1987, petitioner wrote Liberty that it expected the DEQ to enter another order; that it intended to comply because it would be less expensive than having a government agency clean up the site and sue for damages; but that petitioner would not comply if Liberty so advised. Liberty acknowledged receipt of the letter, but did nothing.

On December 17, 1987, the DEQ issued an amended order. It was identical to the August 2, 1986 order, except that it deleted the language requesting a letter and instead ordered the work to begin. It was served on petitioner on December 22, 1987. Petitioner sent it to Liberty nine days later. Liberty did not defend petitioner.

On March 30, 1989, Liberty wrote petitioner that it was denying coverage. It did so solely on grounds other than notice.

Petitioner alone has investigated and remediated the site. It has spent over $13 million to date. Its investigation of the environmental damage began over a year after Liberty first received notice. The clean-up itself, which has accounted for over $12 million, began in February 1992, three years *after* Liberty denied coverage.

B. Proceedings Below

Petitioner and Liberty conducted a jury trial on the two issues which the parties agreed had prevented settlement: Whether the claim was excluded from coverage because (1) petitioner "expected or intended" to cause the contamination damage or (2) because the damage was limited to the property petitioner had owned (and was therefore excluded from coverage under its liability policies). The jury found in petitioner's favor, *i.e.*, that it did not expect or intend to cause the damage and that its clean-up protected Louisiana's groundwater. App. B, 13a.

The parties submitted the remaining issues to the district court. The court held that, while the policies obligated Liberty to defend "suits," not "claims," they did require petitioner to give immediate notice of claims as a "condition precedent" to coverage. It found that the stayed August 2, 1986 order was a claim and that, under *MGIC*, petitioner's failure to give immediate notice of that order forfeited its insurance coverage even though the delay in notice caused no prejudice to Liberty. App. B, 20a.

On appeal, petitioner argued that the district court should be reversed because the Louisiana Supreme Court had rejected *MGIC's* "condition precedent" rule in *Jackson* and because Louisiana courts require the insurer to demonstrate prejudice to avoid coverage on late notice grounds. Alternatively, it argued that the Fifth Circuit was obligated to certify the question before it knowingly applied a rule which Louisiana courts do not.

The Fifth Circuit acknowledged that its *MGIC* decision was inconsistent with *Jackson*. App. A, 7a. But it affirmed, finding it was "bound by our precedent in *MGIC*." *Id.*, 10a. The court denied petitioner's motion to certify. *Id.*, 11a.

Petitioner filed a suggestion for rehearing *en banc*. The Louisiana Department of Insurance, the Louisiana Chemical Association, the Louisiana Shipbuilding and Repair Association, Avondale Industries, Inc. and Citizens For A Cleaner Environment filed motions for leave to appear as *amici* in support of petitioner's request for reversal or certification. The Fifth Circuit denied rehearing. App. C, 29a.

REASONS FOR GRANTING THE WRIT

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court held that federal courts are to apply the law of the state, except in matters governed by the Constitution or by acts of Congress. *Id.*, 78. To do otherwise was deemed an invasion of "rights which in our opinion are reserved by the Constitution to the several states." *Id.*, 80. The ultimate goal is to achieve the same result regardless of whether the case is brought in state or in federal court pursuant to diversity jurisdiction. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945).

The outcome of this case was improperly determined by the fact that it was decided in federal court. First, the Fifth Circuit applied its own rule even though it has been rejected by the Louisiana Supreme Court and is not applied by Louisiana state courts. Second, the court refused to certify the question so that the Louisiana Supreme Court could review the matter before the rejected rule was applied in this case. The Court should grant certiorari. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("The rules indicate that the Court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an

important question of local law in a way probably in conflict with applicable local decisions.' ").

I.

THE FIFTH CIRCUIT VIOLATED *ERIE* BY FAILING TO APPLY LOUISIANA LAW IN THIS DIVERSITY CASE.

A. The Fifth Circuit's Prediction Of Louisiana Law In *MGIC*.

The district court held that the "harsh result" in this case was required by *MGIC Indem. Corp. v. Central Bank of Monroe, La.*, 838 F.2d 1382 (5th Cir. 1988). The Fifth Circuit erred in its interpretation of Louisiana law in *MGIC*, and it is that error which it protected from review by denying petitioner's motion to certify.

In *MGIC*, United was a Central Bank customer. A Central Bank officer mistakenly approved a potentially unlimited letter of credit in favor of Philadelphia Gear to cover United's purchases. Central Bank discovered the problem after United had incurred a $4.5 million debt. United defaulted. Philadelphia Gear sued Central Bank when it failed to honor drafts on the letter of credit. Philadelphia Gear won, and Central Bank appealed.

Central Bank had director and officer's liability insurance with MGIC. It first gave notice to MGIC while its appeal of Philadelphia Gear's judgment was pending. MGIC filed a declaratory judgment action claiming Central Bank's failure to give timely notice relieved it of its coverage obligations. The jury found the insurer had been prejudiced by Central Bank's failure to give timely notice. Central Bank appealed.

The Fifth Circuit found no governing decision of the

Louisiana Supreme Court. The *MGIC* court admitted that the most recent Louisiana intermediate appellate cases held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds. 838 F.2d at 1387. It admitted that it could affirm by finding the insurer had been prejudiced as a matter of law. *Id.*, fn. 2. Instead, the *MGIC* court affirmed by holding that the insurer need not show prejudice to avoid coverage when the policy states that notice is a "condition precedent" to coverage:

> We hold that the language stating that compliance with this provision is a condition precedent to recovery under the policy means exactly what it says, and that if Central failed to comply with this provision by not giving MGIC timely notice of the claim made, then the claim will not be covered under the policy, regardless of whether MGIC can demonstrate prejudice.

Id., 1385-86.

Unlike the insurer in *MGIC*, Liberty could not demonstrate that it was prejudiced by the delayed notice in this case. It argued that this fact was immaterial under *MGIC*. The district court agreed, and the Fifth Circuit affirmed.

B. But The *MGIC* Court Failed To Cite Or Discuss A Louisiana Supreme Court Decision Rejecting The "Condition Precedent" Rule.

In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 23 So. 2d 765 (La. App. 1945), a Louisiana appellate court applied the "condition precedent" rule and held that the insured forfeited coverage on account of a delay in notice which caused no harm to his liability insurer:

> Since the giving of notice is required as a condition precedent to recovery, and since the giving of a notice by the insured some eighty-two days after the accident is not one "as soon as practicable" under the circumstances of this case, the judgment appealed from should be affirmed.

Id., 770.

The Louisiana Supreme Court rejected the "condition precedent" rule. It held that courts should balance the equities and consider whether the insurer was prejudiced by the delay in notice in every case:

> Each case involving delayed notices must stand upon its own facts and circumstances. The Court may consider in balancing the equities, not only the time intervening between the accident and the date of notice to the insured, and whether or not the claim is a direct one by the injured persons, under Act 55 of 1930, but also when the parties first discovered that substantial injury had been done or that a claim would be made; the time when the injured party discovered that insurance existed and knew the identity of the insurer; what prejudice to the insurance company's defense has been caused by the delay; the good faith of the insured and injured party; and the existence of any special circumstances, especially those indicating fraud or collusion.

Jackson, 29 So. 2d 177, 179 (La. 1946). Applying this test, the Louisiana Supreme Court reversed. The court concluded that the

insured had reasonable grounds to delay notice, there was no substantial prejudice to the insurer and no evidence of fraud, collusion or bad faith. *Id.*

Louisiana appellate cases following *Jackson* have held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds.[1] The Louisiana appellate cases from which the Fifth Circuit derived its "condition precedent" rule in *MGIC — Menard* (1966), *Payton* (1966) and *Hallman* (1963), 838 F.2d at 1386 — did not cite *Jackson* and did not reach the Louisiana Supreme Court. The cases cited in footnote 1 were all decided after *Menard, Payton* and *Hallman,* and include cases decided by the Louisiana circuits that decided those three cases.

C. The Fifth Circuit Admits That *MGIC* Is In Conflict With *Jackson.*

The Fifth Circuit admitted in this case that the Louisiana Supreme Court rejected *MGIC's* holding that a non-prejudicial delay in notice breaches a "condition precedent" to coverage:

> Notably, this court's decision in *MGIC* neglected to discuss a Louisiana Supreme Court opinion *disposing of a substantially*

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1. *See, e.g., Davis v. Allstate Ins. Co.,* 272 So.2d 458, 462 (La. App. 1973); *Heimbaugh v. Federal Ins. Co.,* 281 So.2d 839, 845-846 (La. App. 1973); *Kinchen v. Dixie Auto Ins. Co.,* 343 So.2d 263, 265 (La. App. 1977); *Moskau v. Ins. Co. of North America,* 366 So.2d 1004, 1006 (La. App. 1978); *Fakouri v. INA,* 378 So.2d 1083, 1086 (La. App. 1979); *Champion v. Panel ERA Mfring. Co.,* 410 So.2d 1230, 1236 (La. App. 1982); *Gully & Assoc. v. Wausau Ins. Cos.,* 536 So.2d 816, 818 (La. App. 1988); *Rovira v. LaGoDa, Inc.,* 551 So.2d 790, 794 (La. App. 1989); *Barnes v. Lumbermen's Mut. Cas. Co.,* 308 So.2d 326, 328 (La. App. 1975); *Branzaru v. Millers Mut. Ins. Co.,* 252 So.2d 769 (La. App. 1971); *Trosclair v. CNA,* 637 So. 2d 1168 (La. App. 1994). While Louisiana's prejudice requirement once placed it in the minority, it is now the majority rule. *Jones v. Bituminous Cas. Corp.,* 821 S.W.2d 798, 801 (Ky. 1991).

> *similar issue.* The Louisiana Supreme Court has rejected the view that a nonprejudicial delay in notice breaches a "condition precedent" *on similar facts to those presented here.* In *Jackson v. State Farm Mut. Auto. Ins. Co.*, 211 La. 19, 29 So.2d 177 (1946),. . .

App. A, 7a (emphasis supplied).

D. The Fifth Circuit Was Bound By *Jackson*, Not *MGIC*.

The Fifth Circuit should have admitted its error in *MGIC*, applied Louisiana's prejudice requirement and found in petitioner's favor. Instead, it distinguished *Jackson* on grounds not recognized in Louisiana law. This violated *Erie*.

In *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975), the Fifth Circuit refused to apply Texas choice-of-law rules. This Court vacated and remanded:

> A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits. The Court of Appeals in this case should identify and follow the Texas conflicts rule.

423 U.S. at 4-5.

> *1. Jackson Cannot Be Distinguished By The Fifth Circuit's "Sophisticated Business" Concept.*

The Fifth Circuit attempted to distinguish *Jackson* by citing

its contention in *MGIC* that the "equitable rationale [underpinning the prejudice requirement] does not apply so strongly where both parties are sophisticated businesses. . ." App. A, 8a. But no Louisiana state court has applied this exception. The Fifth Circuit admitted as much in *MGIC*. 838 F.2d at 1387.

The Louisiana Supreme Court held in *Jackson* that the equities should be balanced in every case, not just those involving individual (as opposed to business) insureds. 29 So.2d at 179. In Louisiana, the critical factor is whether the delay in notice prejudiced the insurance company's ability to protect itself, not the status of the insured. Judge Tate, later a Justice of the Louisiana Supreme Court, explained in *Miller v. Marcantel,* 221 So.2d 557, 559 (La. App. 1969):

> The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape-hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract to assure the insured and the general public that liability claims will be paid up to the policy limits for which premiums were collected. Therefore, unless the insurer is actually prejudiced by the insured's failure to give notice immediately, the insurer cannot defeat its liability under the policy because of the non-prejudicial failure of its insured to give immediate notice of an accident or claim as stipulated by a policy provision.

2. *Jackson Cannot Be Distinguished Because It Involved A Direct Action Plaintiff.*

The Fifth Circuit also justified its failure to apply *Jackson's* prejudice requirement on the ground that the claimant in *Jackson* was an injured party who sued the defendant's insurer under Louisiana's direct action statute, and the claimant in this case is the insured itself. App. A, 8a. But *Jackson* held that the equities should be balanced in every case and that "whether or not the claim is a direct one. . ." was only one factor to be considered. 29 So.2d at 179. Louisiana courts require prejudice in all cases. As stated in *Miller, supra:*

> The *West* decision [of the Louisiana Supreme Court] primarily involved the liability of an insurer directly to the injured person under the direct-action statute. However, this same test of prejudice or fraud is applied to determine whether delayed notice may exculpate an insurer from liability to its own insured also.

221 So.2d at 560. In fact, the insured was a claimant in *Miller* and every Louisiana appellate case cited in footnote 1, *supra.*

3. *Jackson Cannot Be Distinguished By Counting Days.*

Finally, the Fifth Circuit attempted to distinguish this case from *Jackson* by comparing the length of delay in the two cases. App. A, 8a. But Louisiana courts decide late notice cases by determining whether the insurer was prejudiced, not by arbitrarily counting days. "Though notice of an accident comes a substantial amount of time after it occurred, as long as the rights of the insurer are not prejudiced by the delay, coverage still

exists." *Moskau, supra,* 366 So.2d at 1006-7 (insurer lost notice defense because 2 1/2 year delay in notice caused no prejudice).

II.

THE FIFTH CIRCUIT VIOLATED *ERIE* BY DENYING PETITIONER'S MOTION TO CERTIFY.

The Louisiana Supreme Court is the "ultimate expositor" of Louisiana law in our federal system. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975). Rule XII of the Rules of the Supreme Court of Louisiana allowed the Fifth Circuit to certify the question if it concluded there were "no clear controlling precedents in the decisions of the supreme court of this state."[2]

The Fifth Circuit decided the Louisiana Supreme Court's *Jackson* decision was not controlling precedent. App. A, 8a. Instead of certifying the question, the court held it was bound by its *MGIC* decision. This violated *Erie.*

In *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), the Second Circuit had held that Florida law was consistent with the Second Circuit's interpretation of *Diamond,* a decision of New York's highest court. The court denied a motion to certify the question to the Florida Supreme Court.

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2. "When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it." La. Sup. Ct. R. XII, § 1.

A unanimous Court vacated the judgment and remanded so that the Second Circuit could reconsider its denial of the motion to certify:

> Such a construction of *Diamond*, the Court of Appeals said, would have "the prophylactic effect of providing a disincentive to insider trading." *Id.*, at 823. And so it would. Yet under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a State can make just the opposite her law, providing there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce.

Id., 389.

The Court stated:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

Id., 416 U.S. at 390-91.

In *Lehman Brothers*, the Court found that certification was appropriate because Florida law was unsettled and federal judges in New York were " 'outsiders' lacking common exposure to local law which comes from sitting in the jurisdiction." 416 U.S. at 391.

The need for certification is even clearer here. If *MGIC* is not clearly inconsistent with *Jackson* and its progeny as petitioner claims, there is at least substantial reason to doubt that it is a correct statement of Louisiana law. The Louisiana Supreme Court rejected *MGIC*'s condition precedent approach in *Jackson;* a long line of Louisiana cases have held that an insurer must demonstrate prejudice to avoid coverage on late notice grounds; and no Louisiana court has found that an insurer is excused from this requirement when the insured is a business.

Further, the Fifth Circuit's failure to apply Louisiana's longstanding prejudice requirement may be related to the fact that no judge from Louisiana sat on the panels that decided *MGIC* or this case. Three months after *MGIC* was decided, a Senior Fifth Circuit judge from Louisiana noted:

> Under Louisiana law, the insurer cannot escape liability because of the insured's failure to give notice of loss as soon as practicable; to avoid coverage the insurer must demonstrate prejudice caused by the insured's delay.

Sandefer Oil & Gas, Inc. v. AIG Oil Rig of Texas Inc., 846 F.2d 319, 321 (5th Cir. 1988) (Wisdom, J.). *See also, Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 198 (5th Cir. 1985).

The Fifth Circuit abused its discretion by applying *MGIC* and denying the motion to certify. The court usurped the Louisiana Supreme Court's authority to change Louisiana law. Its decision invites forum-shopping, the very result *Erie* was intended to prevent. The danger is particularly acute here because most insurance companies are not Louisiana citizens and will be able to invoke diversity jurisdiction to take advantage of the Fifth Circuit rule.

The easiest and simplest method of assuring that Louisiana law is correctly applied, and that *Erie* is complied with, is to certify the question to the Louisiana Supreme Court.

CONCLUSION

Petitioner respectfully requests the Court to grant this petition, issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit and vacate and remand for reconsideration of petitioner's motion to certify.

Respectfully submitted,

JAY A. CANEL
Counsel of Record
STEPHEN D. DAVIS
CANEL, DAVIS & KING
Attorneys for Petitioner
Joslyn Manufacturing Company
10 South LaSalle Street
Suite 3400
Chicago, IL 60603
(312) 372-4142

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT, DATED SEPTEMBER 2, 1994

JOSLYN MANUFACTURING COMPANY,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

No. 93-5563.

United States Court of Appeals,
Fifth Circuit.

Sept. 2, 1994.

* * *

T. Haller Jackson, III, Tucker, Jeter, Jackson & Hickman, Shreveport, LA, Stephen D. Davis, Jay A. Canel, Canel, Davis & King, Chicago, IL, for appellant.

Jack O. Brittain, Sr., Brittain & Sylvester, Natchitoches, LA, Martha J. Koster, Lee H. Glickenhaus, Boston, MA, for appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

Appendix A

REYNALDO G. GARZA, Circuit Judge:

Joslyn Manufacturing Company ("Joslyn") filed this action for declaratory judgment seeking to enforce an insurance policy with Liberty Mutual Insurance Company ("Liberty"). The policy would obligate Liberty to defend and indemnify Joslyn against Louisiana Department of Environmental Quality ("DEQ") Compliance Orders directing Joslyn to investigate and remediate environmental damage at Joslyn's former wood treatment plant in Bossier City, Louisiana. Joslyn seeks reimbursement for its past defense costs, indemnity of its past clean-up costs, and a declaration that Liberty must pay Joslyn's future defense and clean-up costs. For the following reasons, we affirm the district court.

FACTS

Joslyn purchased the Lincoln Creosoting Plant in Bossier City on July 24, 1950, where it treated wood with creosote. It operated the facility until 1969 when it sold the plant to Koppers, Inc. on December 1, 1969. Joslyn has been a Liberty Mutual insured since 1945. From 1962 through 1969 the creosote plant was an insured location under Joslyn's policies with Liberty. Neither party can locate any of the pre-1962 liability policies between Joslyn and Liberty.

In 1985, the DEQ began studying the old Lincoln Creosoting Plant site. On October 14, 1985, a report was issued to the DEQ that found the soil at the site, as well as an extremely high probability of the groundwater, to be contaminated. On December 6, 1985, the DEQ sent Joslyn an information request concerning the site, and Joslyn responded on February 7, 1986. On August 2, 1986, the DEQ issued a compliance order finding

that Joslyn and twelve other parties were subject to liability for clean-up and remedial costs, and ordered the parties to submit an approved clean-up plan for the site. This order was stayed because of requests for a hearing. The August 2, 1986 DEQ Compliance Order was amended on December 17, 1987.

Joslyn first advised Liberty of the DEQ's actions on May 19, 1987, and on June 23, 1987. Liberty denied coverage by letter of March 30, 1989. This suit seeking declaratory judgment ensued.

On July 8, 1993, United States District Judge Tom Stagg issued a Memorandum Ruling, 836 F.Supp. 1273. In it the court found that Liberty had no duty to indemnify Joslyn because Joslyn failed to comply with the "immediate notice" condition precedent by waiting nine months before giving notice of an August 2, 1986 DEQ Compliance Order asking Joslyn to submit a letter to the DEQ stating whether it would voluntarily investigate and remediate the contamination at the property. The court further held that Liberty had no duty to defend Joslyn because the Compliance Order directing Joslyn to investigate and clean up the property was not a "suit." Finally, the court struck the affidavit of Philip Gehrke, Joslyn's Risk Manager from 1947 to 1983, regarding the missing insurance policies for 1950 to 1962. Joslyn has timely appealed.

DISCUSSION

This case is subject to a *de novo* review by this court. *Fritiofson v. Alexander,* 772 F.2d 1225, 1239 (5th Cir.1985). The pertinent portions of the insurance contract provided:

> As respects the insurance afforded by the other terms of this policy the company shall:

> (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

The "Conditions" section of the Liberty policies stated:

> NOTICE OF CLAIM OR SUIT If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice summons or other process received by him or his representative.
>
> ACTION AGAINST COMPANY No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.[1]

Appellant Joslyn argues that the trial court erred in ruling that they forfeited their insurance coverage because they failed to

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1. This language is from a 1962 policy issued to Joslyn. Liberty Mutual has stated that the language used in the 1962 policy is similar to the language in the 1963-1969 policies, unless specifically noted. *See* Liberty Mutual's post-trial brief at p. 6, fn. 2. Joslyn has not contested this statement.

immediately notify Liberty of the August 2, 1986 DEQ Compliance Order, as was required by the insurance contract. Joslyn asserts that the August 2, 1986 DEQ order was not a claim or suit which triggers their duty to provide immediate notice to Liberty.[2] Appellant states that the DEQ Compliance Order asked it only to submit a letter stating whether it would voluntarily address the contamination. Joslyn and the other respondents declined and exercised their right to request a hearing. On May 19, 1987, Joslyn gave notice of the potential "future claim" when it was unclear what the DEQ would do. They then gave notice again on June 23, 1987, when it expected the DEQ to enter an amended Compliance Order directing the work to begin. When the DEQ served Joslyn with the amended order on December 17, 1987, Joslyn promptly sent it to Liberty on December 31, 1987. Therefore, Joslyn contends that it was only this amended letter that triggered their duty to notify Liberty, of which Joslyn gave timely notice, and that the district court erred in finding that the notice was late. We disagree.

The August 2, 1986 Compliance Order stated that Joslyn was subject to liability for clean-up and remedial costs, and ordered it to submit an approved clean-up plan for the site. The August 2, 1986 Compliance order is substantially equivalent to the Amended Compliance Order dated December 17, 1987, of which Joslyn agrees is a claim. This court concludes that this order was, at least, a claim which triggers Joslyn's contractual obligation to

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2. The district court notes the incongruent position advanced in the early stages of the trial, where Joslyn admitted that the August 2, 1986 order was a claim when attempting to engage Liberty's duty to defend (as well as reimburse any expenses already incurred). *See* Memorandum Ruling p. 7 fn. 2. Joslyn has apparently restructured its argument to allege that the August 2, 1986 DEQ Order was not a claim or suit which would trigger the duty to defend, and asserts that no claim or suit occurred until the Amended Compliance Order of December 17, 1987, of which Liberty was immediately notified.

provide Liberty with immediate notice thereof as an express condition precedent to coverage. Joslyn waited nine months before providing Liberty with the requisite notice, thereby committing a material breach of a condition precedent to coverage under the policy. We next address the consequences of this late notice on the rights and liabilities of the parties to the contract.

Joslyn suggests that, even if they were late in providing Liberty with notice, Louisiana law interprets this clause to require "reasonable" notice to allow the insurer to adequately prepare a defense. Joslyn claims that they were reasonable in their conduct. Furthermore, Joslyn asserts that Liberty suffered no prejudice from any delay, and therefore should not be relieved from extending coverage to Joslyn. Appellant claims that Liberty had a full opportunity to participate in Joslyn's defense and to protect itself, but chose to do nothing and let Joslyn bear the costs of the defense.[3]

In holding that prejudice was not a factor to consider in policies where notice was a condition precedent to coverage, the district court relied on three relatively recent Fifth Circuit opinions: *Peavey Co. v. Zurich Insurance Co.*, 971 F.2d 1168 (5th Cir.1992); *Auster Oil & Gas, Inc. v. Stream*, 891 F.2d 570 (5th Cir.1990); and *MGIC Indemn. Corp. v. Central Bank of Monroe, La.*, 838 F.2d 1382 (5th Cir.1988). "The rule in Louisiana is that where the requirement of timely notice is not an express condition precedent, the insurer must demonstrate that it was sufficiently prejudiced by the insured's late notice" *Peavey*, 971

3. Moreover, Joslyn points out, Liberty never claimed prejudice in its reasons for claim denial, and should be barred under waiver principles from raising this defense on appeal. Liberty Mutual did not waive this defense, as it properly raised it in its answer.

F.2d at 1173. But where prompt notice of a covered occurrence is a "condition precedent" to recovery under an insurance policy, and the insured fails to give such notice, the claim is no longer covered by the policy, regardless of whether the insurer can demonstrate prejudice. *MGIC,* 838 F.2d at 1385-87. In the present case, timely notice was an express condition precedent to coverage. In *MGIC,* we held that the words "condition precedent" mean exactly what they say, and failure to comply with the provision precludes coverage. *Id.* at 1385.

Notably, this court's decision in *MGIC* neglected to discuss a Louisiana Supreme Court opinion disposing of a substantially similar issue. The Louisiana Supreme Court has rejected the view that a non-prejudicial delay in notice breaches a "condition precedent" on similar facts to those presented here. In *Jackson v. State Farm Mut. Auto. Ins. Co.,* 211 La. 19, 29 So.2d 177 (1946), the court reversed an intermediate appellate court decision which relieved an insurer of its obligations under a "condition precedent" analysis even though the insurer received notice soon enough to defend the claim. The Louisiana Supreme Court held that all the facts and circumstances must be considered in "balancing the equities" in late notice cases, including "what prejudice to the insurance company's defense has been caused by the delay . . . ." *Id.,* 29 So.2d at 179.

In requiring the parties to live by the express terms of the contract they freely entered, the *MGIC* court distinguished those cases which have required a showing of prejudice to balance the equities where the policy holders were consumers unlikely to be conversant with all the fine print of their policies. *MGIC,* 838 F.2d at 1387. This court then reasoned that "strict adherence to the terms of the notice provision would result too harshly against unsophisticated consumers and so have required the insurance

companies, in order to bar recovery under the policies, to demonstrate that prejudice had resulted from the lack of notice." *Id.* The equitable rationale does not apply so strongly where both parties are sophisticated businesses, which are expected to be conversant with the terms of their contracts. *Id.*

Our factual scenario requires us to distinguish *Jackson* and follow the precedent laid down in *MGIC*. Unlike the instant case, the insured in *Jackson* had reasonable grounds to believe that no claim would be made until the demand was made upon him. *Jackson*, 29 So.2d at 177, 179. Additionally, the insured was only eighty-two days tardy in providing the necessary notice, *id.* at 177, as opposed to Joslyn's nine month delay. And finally, the court in *Jackson* was painstakingly trying to protect the average citizen who purchases a public liability policy without becoming familiar with its detailed provisions, but simply puts it away against the day when a claim may be made against him. *Id.* at 178. Moreover, the claim in *Jackson* was brought by an injured third party against the insurance company. This court adopted the same prejudice inquiry for claims brought pursuant to the Louisiana Direct Action Statute. *See Auster,* 891 F.2d at 578 (holding non-prejudicial delay in notice could not bar recovery by third party claimant under statute). Such is not the case before us. Joslyn is not a third party claimant, but a sophisticated business entity. Consequently, these equitable exceptions do not weigh in their favor.

In *MGIC* this court held that the insurer is not compelled to prove prejudice where timely notice is a condition precedent to coverage for a sophisticated business entity:

> Much of the debate between [the parties] at both the trial and appellate level concerns

> whether this language negates MGIC's obligation to demonstrate prejudice resulting from lack of notice. We hold that the language stating that compliance with this provision is a condition precedent to recovery under the policy means exactly what it says, and that if Central failed to comply with this provision by not giving MGIC timely notice of the claim made, then the claim will not be covered under the policy, regardless of whether MGIC can demonstrate prejudice.

MGIC, 838 F.2d at 1386. It is well established under Louisiana law that:

> The courts may not make a contract for the parties. Their functions and duties consist simply in interpreting and enforcing the agreement as actually made. It is self-evident that a failure to restrict the rights of an injured person to the terms and conditions of the insurance contract would expose the insurer to liability far and beyond the scope of the contract.
>
> . . . To allow recovery in the absence of compliance of these provisions of the contract would be unreasonable and inequitable, and would establish a dangerous precedent, inviting obvious instances of abuse.

Id. (citing *Hallman v. Marquette Cas. Co.*, 149 So.2d 131, 135-36

(La.Ct.App.1963)). Under these facts, a nine month delay constitutes a material breach of the condition precedent of immediate notice. *MGIC* instructs us that prejudice need not enter the calculation.

Appellant asks us to limit *MGIC* to the facts of that case, where the notice came after trial had already concluded causing obvious prejudice to the insurance company. However, this court enunciated its broad holding in *MGIC* even after recognizing the opportunity to limit the decision to the narrow facts before it. ". . . *Hallman* is strong support for the proposition that MGIC was prejudiced as a matter of law when Central failed to notify it of the suit until after final judgment. We need not decide the case before us on that basis, however, since we hold that the express contractual provision requiring notice as a condition precedent should be given its full effect." *MGIC*, 838 F.2d at 1386 n. 2. We are bound by our precedent in *MGIC*.

Appellant alleges error committed in the lower court by holding that the DEQ Compliance Order was not a "suit" which Liberty was obligated to defend under its policies. Further, appellant claims that by excluding portions of the affidavit of Joslyn's former Risk Manager and in concluding that Joslyn failed to meet its burden in proving the terms and conditions of the missing liability policies covering Joslyn from 1952 to 1962, the district court committed reversible error. However, we need not reach these subsequent issues since Joslyn did not fully comply with the express terms of the conditions precedent in the contract.

Appendix A

CONCLUSION

In this case we find that a claim was made, at the latest, when Joslyn received the August 2, 1986 DEQ Compliance Order. Timely notice was then due Liberty. Thus, when Joslyn waited nine months to notify Liberty, it violated the condition precedent of timely notice, and therefore its untimely claim is not within the policy's coverage. We will not disregard the express language of the insurance contract, and ignore the condition precedent notice requirement to effectively rewrite the contract to expand coverage for Joslyn. The appellant's motion to certify this question to the Louisiana Supreme Court is DENIED, and the judgment of the district court is

AFFIRMED.

APPENDIX B — MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION DATED JULY 8, 1993

JOSLYN MANUFACTURING COMPANY

v.

LIBERTY MUTUAL INSURANCE COMPANY.

Civ. A. No. 90-2456.

United States District Court,
W.D. Louisiana,
Shreveport Division.

July 8, 1993

* * *

T. Haller Jackson, III, Tucker Jeter Jackson & Hickman, Shreveport, LA, Jay A. Canel, Stephen D. Davis, Canel Davis & King, Chicago, IL, for plaintiff.

Jack O. Brittain, Sr., Brittain & Sylvester, Natchitoches, LA, Martha J. Koster, Lee Glickenhaus, Mintz Levin Cohn Ferris Glovsky & Popeo, Boston, MA, for defendant.

MEMORANDUM RULING

STAGG, District Judge.

This is an action for a declaratory judgment and damages arising from a denial of insurance coverage. Joslyn Manufacturing Company ("Joslyn"), a Massachusetts corporation, filed this action against its insurer, Liberty Mutual

Insurance Company ("Liberty Mutual"), an Illinois corporation. Joslyn seeks, first, the determination whether Liberty Mutual must defend and indemnify Joslyn against the orders of the Louisiana Department of Environmental Quality ("DEQ") compelling remediation of contamination at the old Lincoln Creosoting site in Bossier City, Louisiana; second, Joslyn wants a determination whether Liberty Mutual must pay any costs incurred by Joslyn in connection with the toxic tort personal injury and property damage claims made by neighbors to the site in a suit entitled *Johnson v. Lincoln Creosote et al.*, which is pending in state court. This court has jurisdiction pursuant to 28 U.S.C. § 1332.

This case was tried to a jury from March 15 to March 18, 1993. The insurance policies at issue contain exclusions for damages which were "expected or intended" by the insured and for damage to the insured's own property. The jury found that Joslyn neither expected nor intended that contamination of the environment would result from its operations at the Bossier City site and that Joslyn incurred costs on account of damage to groundwater. Essentially, what remains to be decided is whether Joslyn is entitled to *any* insurance coverage from Liberty Mutual and, if so, the amount of coverage available.

A. THE FACTS

Lincoln Creosoting Company treated wood with creosote at the Bossier City, Louisiana, plant between 1935 and 1950. It also leased property from the Louisiana and Arkansas Railroad, in connection with its operation of the plant.

Joslyn purchased the Lincoln Creosoting Plant in Bossier City on July 24, 1950. It operated the plant until 1969. Lincoln assigned the railroad leases to Joslyn in connection with the plant

sale. Joslyn entered into leases for additional property from the railroad on January 15, 1955 and on October 12, 1967. Both sets of leases contained an indemnity clause. When Lincoln operated the plant, waste water from the creosote treatment operation flowed into a slough on the east end of the property. When Joslyn began operating the plant in 1950, Joslyn by-passed the slough and installed a 30,000-gallon settlement tank to recover creosote for re-use. Within six months, Joslyn also installed a second 10,000-gallon tank in series after the 30,000-gallon tank for the recovery of creosote. In the mid- to late-50s, Joslyn installed an unlined pond in series after the settling tanks to enable it to use pentachlorophenol ("penta") to treat poles. Penta was also recovered from the ponds for re-use. This recovery system was instituted for economic reasons, but it did not recover all creosote and penta from the waste water. In the 1960's, Joslyn began using a small amount of chromium arsenic copper ("CAC") to treat wood, which was used with a closed-system treatment method. Treatment chemicals were released into the environment in each year of Joslyn's operation. Joslyn sold the plant to Koppers, Inc. on December 1, 1969.

Joslyn has been a Liberty Mutual insured since 1945. From 1962 through 1969, the creosote plant was an insured location under Joslyn's policies with Liberty Mutual. Neither party can locate any of the pre-1962 liability policies between Joslyn and Liberty Mutual.

Between 1962 and 1966, Joslyn's general liability policies with Liberty Mutual contained a special Louisiana endorsement which provided coverage for property damage and personal injury caused by an occurrence. An occurrence was defined as "either an accident or a continuous or repeated exposure to conditions which result during the policy period in injury to

persons or real or tangible property which is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence." In the 1967-69 policies, an occurrence was defined as "an accident, including injurious exposure to conditions which results during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint in the insured." None of the policies between 1962 and 1969 contained a pollution exclusion. All of the policies provided insurance coverage for Joslyn's contractual liability to indemnify a lessor for certain specific liability imposed by law on the lessor.

After the sale to Koppers in December 1969, the Bossier City plant was not listed on Joslyn's policy with Liberty Mutual as a location for which coverage was provided.

In 1985 the DEQ began studying the old Lincoln Creosoting Plant site. On October 14, 1985, a report was issued to the DEQ that found the soil contaminated at the site and an extremely high probability of groundwater contamination. On December 6, 1985, the DEQ sent Joslyn an information request concerning the site, and Joslyn responded on February 7, 1986. On August 2, 1986, the DEQ issued a compliance order finding that Joslyn and twelve other parties were subject to liability for clean-up and remedial costs, and ordered the parties to submit an approved clean-up plan for the site. This order was stayed because of requests for a hearing. On December 17, 1987, the DEQ ordered Joslyn and the other potentially responsible parties to investigate and clean up the site. Joslyn's investigation confirmed soil and groundwater contamination at the site.

Joslyn advised Liberty Mutual of the DEQ action on May 19, 1987, and on June 23, 1987. Liberty denied coverage by letter of March 30, 1989.

Appendix B

In March 1987, site neighbors filed a suit against Joslyn and others in the 26th Judicial District Court for Bossier Parish, Louisiana, entitled *Johnson v. Lincoln Creosote Company, Inc.* The complaint alleges that plaintiffs suffered personal injuries and property damage as the result of exposure to chemicals which emanated from the site. Joslyn tendered this suit to Liberty Mutual on or about April 10, 1987. Liberty Mutual tendered a defense to Joslyn for the *Johnson* suit as of February 26, 1992.

B THE INSURANCE POLICIES

1 PRE-1962 POLICIES

The parties agree that Joslyn has been insured by Liberty Mutual since 1945, but that the pre-1962 policies are lost. The parties stipulated that the 1955 and 1956 comprehensive general liability policies with Liberty Mutual provided $1 million in coverage for personal injury, and $1 million for property damage. The 1957-66 policies also provided comprehensive general liability coverage. The 1957-58 policies provided $1 million for personal injury and $1 million for property damage. The 1959 policy had a $3 million single aggregate limit, bodily injury and property damage combined. The 1960-69 policies had a $10 million single aggregate limit for bodily injury and property damage combined.

This is the only evidence concerning the pre-1962 policies which is properly before the court.[1] Joslyn has introduced no

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1. In relation to the pre-1962 policies, Joslyn has attempted to submit, post-trial, the affidavit of Philip Gehrke, its risk manager from 1947 through 1983. Liberty Mutual has filed a Motion to Strike the Affidavit. Liberty Mutual claims it has been deprived of any opportunity to cross-examine Mr. Gehrke on the statements made in his Affidavit. Liberty Mutual's Motion to Strike the Affidavit of

(Cont'd)

evidence of the terms and provisions of the pre-1962 policies. However, even if Joslyn had established the terms and provisions of the pre-1962 policies, coverage would be denied for the reasons stated in the following section.

2 COVERAGE: THE ISSUE OF LATE NOTICE

On August 2, 1986, the Department of Environmental Quality ("DEQ") issued a compliance order finding that Joslyn was subject to liability for clean-up and remedial costs, and ordered it to submit an approved clean-up plan for the site. Joslyn advised Liberty Mutual of the DEQ's actions on May 19, 1987

(Cont'd)

Philip Gehrke is GRANTED. Additionally, as evidence of the terms and provisions of the pre-1962 policies, Joslyn states in its post-trial Reply Brief that:

> Joslyn has represented it had "caused by accident" coverage for this plant from 1950 through 1956; a special Louisiana endorsement providing "occurrence coverage from 1957 through 1966; and "occurrence coverage from 1967 through 1969. Liberty has never challenged that representation. In fact, Liberty acknowledged this coverage in the Illinois case and represented that there was no practical difference in the scope of coverage provided, *i.e.*, all basically covered property damage that was neight expected nor intended by the insured.

(footnote omitted). Joslyn also cites exhibits from the "Illinois case" which were not introduced into evidence in the present case. In the absence of a stipulation or any evidence to support Joslyn's statements, these assertions in a post-trial brief are insufficient to establish the terms and provisions of the pre-1962 policies. Liberty Mutual has expressly challenged Joslyn's lack of evidence on this issue.

and June 23, 1987.[2] The August 2, 1986 DEQ compliance order was amended on December 17, 1987. Liberty Mutual denied coverage on March 30, 1989 based on a 1985 insurance policy. The insurance policies at issue provide, in part:

> NOTICE OF CLAIM OR SUIT. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

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2. The May 19, 1987 letter from Joslyn to Liberty Mutual states "[w]hile there is nothing for [Liberty Mutual] to do at this time, we are putting you on notice that this may result in a future claim under our prior General Liability Policy," and Joslyn enclosed the August 2, 1986 DEQ compliance order. The court notes that in the June 23, 1987 letter to Liberty Mutual, Joslyn states "[n]otice of a claim relative to this site has previously been forwarded to Liberty Mutual . . . [and] [t]he purpose of this letter is to inform you of subsequent events." The letter concludes with the following paragraph:

> Joslyn *reasserts* its claim for insurance coverage for the costs incurred in performing clean-up actions dictated by the Department of Environmental Quality as well as demanding that Liberty Mutual perform its duty to defend Joslyn in these administrative proceedings.

(emphasis added). In Joslyn's brief dated May 25, 1993, Joslyn now asserts that the August 2, 1986 DEQ order was not a claim or suit which would trigger Liberty Mutual's duty to defend. The issue of whether the August 2, 1986 DEQ order is a "suit" which would trigger Liberty Mutual's duty to defend will be addressed in a subsequent section. The court does conclude, however, that this order is, at minimum, a claim, which triggers Joslyn's contractual obligation to provide Liberty Mutual with immediate notice thereof as an express condition precedent to coverage.

Appendix B

And also that:

> No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial, or by written agreement of the insured, the claimant and the company.

See page LM01211 of the policy, found at Tab B of the appendix to Liberty Mutual's post-trial brief, titled "Requests for Rulings of Law".[3]

Joslyn delayed for over nine months before informing Liberty Mutual of the August 2, 1986 DEQ compliance order. Joslyn's notice to Liberty Mutual was clearly *not* immediate, as required by the insurance contracts.

"The rule in Louisiana is that where the requirement of timely notice is *not* an express condition precedent, the insurer must demonstrate that it was sufficiently prejudiced by the insured's late notice." *Peavey Co. v. Zurich Insurance Company,* 971 F.2d 1168, 1173 (5th Cir.1992) (emphasis added), *citing Auster Oil & Gas, Inc. v. Stream,* 891 F.2d 570 (5th Cir.1990); *MGIC Indem. Corp. v. Central Bank of Monroe, La.,* 838 F.2d

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3. This language is from a 1962 policy issued to Joslyn. Liberty Mutual has stated that the language used in the 1962 policy is similar to the language in the 1963-1969 policies, unless specifically noted. *See* Liberty Mutual's post-trial brief at p. 6, fn. 2. Joslyn has not contested this statement.

1382, 1387 (5th Cir.1988); *Barnes v. Lumbermen's Mutual Casualty, Co.*, 308 So.2d 326, 328 (La.App. 1st Cir.1975). In the present case, timely notice *was* an express condition precedent to coverage.[4] In a suit by the insured, where the terms of the insurance contract are breached by the giving of untimely notice, the insurer is not required to show prejudice in order to avoid liability to the insured. *See Jackson v. Transportation Leasing Company,* 893 F.2d 794, 795 (5th Cir.1990) *citing Auster Oil Gas, Inc., supra.*

Joslyn contends that it gave adequate notice to Liberty because Liberty has made no attempt to show that it was prejudiced in any way by delayed notice. Joslyn's only support for this claim is that this court should not follow the Fifth Circuit's decisions in *MGIC Indem. Corp., supra,* and *Jackson, supra,* since the Fifth Circuit "chose not to follow intermediate state appellate court decisions requiring prejudice." Although this court recognizes the harsh consequences of its decision, it is bound by the Fifth Circuit's interpretation of the intermediate state appellate court cases, which is, when notice is a condition precedent to coverage, an insurer is not required to show prejudice in order to avoid liability to the insured. Joslyn, without excuse, failed to give Liberty Mutual timely notice as required by the insurance policies as an express condition precedent to coverage. Liberty Mutual did not waive this defense, as it properly raised it in its answer.[5] In sum, Liberty Mutual owes no

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4. The aforementioned clauses contained in the Liberty Mutual policies are substantially similar to the clauses at issue in *Auster Oil & Gas, Inc., supra,* which were held to require timely notice as an express condition precedent to coverage.

5. Additionally, Liberty Mutual's denial of coverage on March 30, 1989 was based upon a 1985 policy which contained a "pollution exclusion," not found in the policies involved in the present suit.

insurance coverage to Joslyn for the claims asserted by the DEQ because Joslyn failed comply with the express terms of the policies.

3 LIBERTY MUTUAL'S DUTY TO DEFEND

A THE DEQ ORDERS

Joslyn alleges that Liberty Mutual has the "duty to defend and indemnify [Joslyn] against the orders of the [DEQ] compelling remediation of contamination at the [site]. . . ." *See* Pretrial Order at page 1.

The insurance contracts at issue only require Liberty Mutual to defend *suits* against its insured. Although the policies provide coverage for claims against the insured, the duty to defend only arises when a suit has been filed. This distinction becomes clear after reviewing the insuring agreement contained within the policies. This provision provides that Liberty Mutual has the right and duty to defend a suit against Joslyn, and that it *may* investigate and settle any *claim or suit* agaist Joslyn.[6]

Thus, the initial issue which must be addressed is whether

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6. The 1962 policy provides that Liberty Mutual: shall defend any *suit* against the insured alleging such injury, disease or destruction and seeking damages on account thereof, even if such *suit* is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any *claim or suit* as it dems expedient. . . .

(emphasis added).

the August 2, 1986 and/or the amended December 17, 1987 DEQ orders constitute "suits" under the terms of the policies which would thereby invoke Liberty Mutual's duty to defend.[7] The word "suit" is not defined in Liberty Mutual's policies. "Under Louisiana law, an insurance policy is a contract and the words used in a contract 'are to be understood in the common and usual signification, without attending so much to grammatical rules as the general popular use.' " *F.D.I.C. v. Mijalis,* 800 F.Supp. 397, 400 (W.D.La.1992) *citing Harmon v. Lumbermens Mutual Casualty Company,* 247 La. 263, 170 So.2d 646, 651 (1965).

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . . . *NLRB v. Federbush Co.,* 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.)

King v. St. Vincent's Hosp., __ U.S. __, __, 112 S.Ct 570, 574, 116 L.Ed.2d 578 (1991) (footnote omitted). No Louisiana cases defining the word "suit" have been cited by the parties. The court's own research has found no Louisiana cases interpreting the word "suit" in the context of an insurance contract and the "duty to defend." Louisiana cases defining the word "suit" in other contexts have been unearthed. For example, in *Sims v. Sims,* 247 So.2d 602 (La.App. 3d Cir.1971), the Court examined the meaning of the word "suit" in the context of the Louisiana Code

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7. By Minute Entry dated May 25, 1993, this court requested that Joslyn identify which DEQ orders it was claiming that Liberty Mutual was required to defend. Joslyn identified the August 2, 1986 and December 17, 1987 DEQ orders and argues that the August 2, 1986 order is neither a claim nor a suit.

of Civil Procedure. The Court noted that the Louisiana Code of Civil Procedure did not contain a definition of the word "suit," and stated:

> The 1870 Code of Practice art. 96, defined a "suit" as a "demand, made before a competent judge." In this sense, a "suit" is the same as a "civil action" under LSA-C.C.P. art. 421. We conclude that the redactors of the Code of Civil Procedure intended the word "suits" in art. 531 to be synonymous with the words "civil action" in art. 421. Under this construction, it is clear that a suit is pending after it has been commenced by the filing of a pleading in a court of competent jurisdiction.

Id. at 604; *see also Stringfellow v. Nowlin Bros.*, 157 La. 683, 102 So. 869 (La.S.Ct.1925).

Cases from other jurisdictions are relevant because "[t]he law of insurance is the same in Louisiana as in other states." *See Calcasieu-Marine Nat. Bank v. American Employers' Ins. Co.*, 533 F.2d 290, 295 (5th Cir.), *cert. denied* 429 U.S. 922, 97 S.Ct. 319, 50 L.Ed.2d 289 (1976). In *Simon v. Maryland Cas. Co.*, 353 F.2d 608 (5th Cir. 1965), the question before the Court in Texas was:

> whether the defense coverage provisions and no action clause of a general liability policy are to be read so literally that an assured, who in an adversary proceeding has been adjudicated guilty of negligence by a constitutional court, is denied any coverage

> because the suit was by, not against him and no affirmative money judgment was rendered against him.

Id. at 610. In discussing the phrase "suit against the insured," the Court noted:

> A suit is against an assured when, in a *judicial* proceeding to which he is a party (or deemed by the law to be a party), a definable claim or contention is asserted that the assured has a legal liability for damage or injury to person or property.

Id. at 612 (emphasis added). In *Ray Industries, Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754 (6th Cir.1992), the Court extensively examined the issue of whether an EPA letter constituted a "suit" that would trigger a duty to defend. The Court noted that the general dictionary definition and the traditional meaning of the word "suit" refer only to those proceedings that take place in a court of law. The Court further noted that the insurance policies at issue specifically distinguished between a suit and a claim in several places. The Court concluded the Liberty Mutual's duty to defend was not triggered by the PRP letter from the EPA. For further discussions and varying analyses, concerning whether a PRP letter constitutes a suit for purposes of the duty to defend, *see also, Aetna Cas. and Sur. Co. v. General Dynamics Corp.*, 968 F.2d 707, 713 (8th Cir.1992) (Under Missouri law, EPA demand letters requiring clean up of various sites do not constitute suits for damages which trigger duty to defend.); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir.1991) (Under Idaho law, EPA's administrative claims trigger the insurer's duty to defend.); *Ryan v. Royal Ins. Co. of America*, 916 F.2d 731 (1st

Cir.1990) (Under New York law, agencies' letters were not sufficiently coercive to constitute a suit, however, the word suit does not necessarily require a lawsuit to be filed before the duty to defend arises.); *Avondale Industries, Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989), *cert. denied*, 496 U.S. 906, 110 S. Ct. 2588, 110 L.Ed.2d 269 (1990) (Interpreting New York contract law, the Court concluded that a letter from the Louisiana Department of Environmental Quality constituted a suit, as it was a formal demand for immediate action to clean up a hazardous waste site.) and *Maryland Cas. Co. v. ARMCO, Inc.*, 822 F.2d 1348 (4th Cir.1987) (Under Maryland law, EPA claim seeking compliance with regulatory directives, including reimbursement of response costs does not constitute a claim for "damages" and does not invoke the duty to defend.).

The DEQ orders at issue are entitled "In the Matter of: Lincoln Creosoting Facilities, Bossier City, Louisiana Proceedings Under the Louisiana Environmental Quality Act, La.Rev.Stat. 30:1051 *et seq.* Compliance Order." The orders state that they are issued by the Secretary of the Department of Environmental Quality of the State of Louisiana under the authority granted in the LEQA and the orders notify respondents (not "defendants") that failure to reply to the orders would subject respondents "to *possible* enforcement proceedings under Section 1973 of the Act [LEQA] which could result in the assessment of civil penalties in an amount not to exceed $50,000 for each day of continued non-compliance." (emphasis added). La.Rev.Stat. 30:1073 has been re-designated as 30:2025 and sets forth the permissible enforcement proceedings under the LEQA. La.Rev.Stat. 30:2025 specifically grants the DEQ the authority to file a civil action, *i.e.*, the LEQA itself differentiates a compliance order from a civil action and considers a compliance order something less than a civil action.

Appendix B

This court concludes that the August 2 and the amended December 17 compliance orders issued by the DEQ do not rise to the level of a suit which would invoke Liberty Mutual's duty to defend. The court bases this conclusion on several factors: (1) the compliance order itself specifically provides that if respondent refuses to comply with the order, the respondent could be subject to possible enforcement procedures under § 1073 [now: § 2025] of the LEQA, *i.e.*, a civil action or civil penalties; (2) the general and traditional definition of a suit refers to a formal proceeding in a court of law; and most importantly, (3) the insurance policies specifically differentiate between the words claim and suit for purposes of the duty to defend. An insurance policy is a contract, and this court finds that Liberty Mutual only contracted to defend Joslyn against suits, not against compliance orders of this nature.

B THE JOHNSON TOXIC TORT SUIT

On February 26, 1992, Liberty Mutual agreed to defend Joslyn in the *Johnson* suit. At trial, Joslyn's in-house attorney, Carl Grabinski, testified that Liberty Mutual had still not reimbursed Joslyn's defense costs in that case. After the jury trial in this matter, the parties were ordered to submit a list of issues which remained to be decided by the court. A briefing schedule was then established. The issue of Liberty Mutual's duty to defend the *Johnson* suit was not identified as an issue which remained to be decided.

By a minute entry dated April 26, 1993, the parties were asked to inform the court whether the issue of payment of defense costs in the *Johnson* suit remained to be decided. In a letter to this court dated May 6, 1993, Liberty Mutual states that it agreed to defend Joslyn in the *Johnson* suit and that Joslyn acknowledges that Liberty Mutual has honored its obligation. Thus, the court

considers this issue MOOT and attaches Liberty Mutual's letter as evidence thereof. *See* attached Appendix "A."

IT IS ORDERED that defendant shall submit a judgment consistent with the terms of this memorandum ruling within ten (10) days of its filing.

THUS DONE AND SIGNED.

APPENDIX A

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
One Financial Center
Boston, Massachusetts 02111

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Lee H. Glickenhaus

May 6, 1993

Honorable Judge Tom Stagg
Federal District Court
Western District of Louisiana
500 Fannin Street
Room 106
Shreveport, LA 71101

Re: Joslyn Manufacturing v. Liberty Mutual Insurance

Company Number CV90-2456

Appendix B

Dear Judge Stagg:

This letter is Liberty Mutual's brief response to Joslyn's brief pursuant to the minute order of April 26, 1993 concerning Joslyn's claim for coverage with regard to the *Johnson* Complaint. Liberty Mutual has agreed to defend to Joslyn from the *Johnson* case. Joslyn acknowledges in its papers that Liberty Mutual has honored this obligation. There is no suggestion that Liberty Mutual will refuse to honor this obligation in the future. Accordingly, this issue is moot and there is no need for the Court to issue a ruling on this matter at all.

Respectfully submitted

/s/ *Lee H. Glickenhaus*
Lee H. Glickenhaus

cc: Steve Davis, Esq.
Jack O. Brittain, Esq.
T. Haller Jackson, III, Esq.
Martha Koster, Esq.

LHG/bw: 278228.1

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 30, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5563

JOSLYN MANUFACTURING CO.,

Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE CO.,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ON SUGGESTION FOR HEARING EN BANC

(September 30, 1994)

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, (FRAP and Local Rule 35) the Suggestion for Hearing En Banc is DENIED.

* * *

Appendix C

ENTERED FOR THE COURT:

s/ Reynaldo G. Garza
United States Circuit Judge

[stamped]
CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

Supreme Court, U.S.
FILED
DEC 19 1994
OFFICE OF THE CLERK

(2)

No. 94-978

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JOSLYN MANUFACTURING COMPANY,
Petitioner,

vs.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Richard P. Ieyoub (2217)
Attorney General
State of Louisiana
Department of Justice
Post Office Box 94005
Baton Rouge, Louisiana
70804-9005
(504) 342-7013

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INTEREST OF THE AMICUS CURIAE

The Attorney General of the State of Louisiana ("Attorney General") is the chief legal officer of the State and is responsible for protecting the rights and interests of the State and its citizens. The ruling of the United States Fifth Circuit Court of Appeals in this case conflicts with long-standing Louisiana law and encroaches on public policy matters of substantial importance to the State of Louisiana.

Therefore, the Attorney General has an interest in the outcome of this case.

The Attorney General respectfully submits this brief in support of the Petition for Writ of Certiorari filed by Joslyn Manufacturing Company ("Joslyn").

SUMMARY OF ARGUMENT

The Fifth Circuit violated the Erie doctrine by considering this case under a "condition precedent" analysis which has been rejected by the Louisiana Supreme Court. Further, the ruling of the Fifth Circuit encroaches on public policy matters of substantial importance to the State of Louisiana.

Therefore, this Court should grant Joslyn's Petition for Writ of Certiorari, vacate the ruling of the Fifth Circuit, and remand this case for reconsideration of Joslyn's motion to certify the question presented herein to the Louisiana Supreme Court.

ARGUMENT

In the proceedings below, the Fifth Circuit held that, under Louisiana law, a liability insurance company can avoid coverage based on the insured's delay in giving notice of a claim even though the delay caused no harm to the insurer. This decision is in conflict with the law given by Louisiana courts. For reasons set forth below, the Attorney General submits that the question presented herein should have been certified to the Louisiana Supreme Court.

I. The Fifth Circuit Violated the Erie Doctrine By Failing to Apply Louisiana Law.

The Fifth Circuit violated the Erie doctrine by deciding this case under a "condition precedent" analysis which has been rejected by the Louisiana Supreme Court. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938); Guaranty Trust Co. v. York, 326 U.S.

99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945); Jackson v. State Farm Mut. Auto. Ins. Co., 211 La. 19, 29 So.2d 177 (1946).

In Jackson v. State Farm Mut. Auto Ins. Co., the Louisiana Supreme Court rejected the "condition precedent" analysis and clearly established that in each case involving delayed notice the court should consider what prejudice to the insurance company's defense has been caused by the delay. The prejudice rule provided in Jackson is the long-standing law of Louisiana and has been applied extensively by Louisiana courts.[1]

---

[1] Trosclair v. CNA, 637 So.2d 1168, 1170 (La. App. 4th Cir. 1994); Rovira v. LaGoDa, Inc., 551 So.2d 790, 794 (La. App. 5th Cir. 1989); Gulley & Associates v. Wausau Insurance Co., 536 So.2d 816, 818 (La. App. 1st Cir. 1988); Champion v. Panel ERA Manufacturing Co., 410 So.2d 1230, 1236 (La. App. 3rd Cir. 1982); Fakouri v. INA, 378 So.2d 1083, 1086 (La. App. 3rd Cir. 1979);

Under the Erie doctrine, the Fifth Circuit is bound by the substantive law of Louisiana and should have applied the prejudice requirement established in Jackson v. State Farm Mutual Auto. Insurance Company.

Moskau v. Insurance Co. of North America, 366 So.2d 1004, 1006 (La. App. 1st Cir. 1978); Kinchen v. Dixie Auto Insurance Co., 343 So.2d 263, 265 (La. App. 1st Cir. 1977); Barnes v. Lumberman's Mutual Casualty Co., 308 So.2d 326, 328 (La. App. 1st Cir. 1975); Davis v. Allstate Insurance Co., 272 So.2d 458, 462 (La. App. 2nd Cir. 1973); Heimbaugh v. Federal Insurance Co., 281 So.2d 839, 845-846 (La. App. 1st Cir. 1973); Branzaru v. Miller's Mutual Ins. Co., 252 So.2d 769 (La. App. 1st Cir. 1971); Miller v. Marcantel, 221 So.2d 557, 560 (La. App. 3rd Cir. 1969); Reagan v. Mid-Continent Underwriters, Inc., 150 So.2d 75, 79 (La. App. 4th Cir. 1963); Hayward v. Carolina Insurance Co., 51 So.2d 405, 407 (La. App. 1st Cir. 1951); Reid v. Monticello, 44 So.2d 509, 512 (La. App. 1st Cir. 1950).

II. The Question Presented Herein Should Be Certified to the Louisiana Supreme Court Because the Fifth Circuit's Ruling Encroaches on Public Policy Matters of Substantial State Import.

Under Erie, the Louisiana Supreme Court has the prerogative to change Louisiana law, not the Fifth Circuit. The Fifth Circuit's usurpation of this right encroaches on public policy matters of substantial importance to the State of Louisiana.

A. The State of Louisiana has a substantial interest in maintaining insurance coverage for environmental contamination of State resources.

The ruling of the Fifth Circuit will allow insurers to avoid coverage for environmental contamination in Louisiana based on hypertechnical grounds. Several hundred abandoned hazardous waste sites exist in Louisiana, many of which were owned or operated by

persons or entities which cannot pay the costs of remedying the environmental damage on their property. Because remediation costs are often extremely high and the State has only limited funds available to do this work, liability insurance is often critical to the clean-up of hazardous waste sites in Louisiana.

Therefore, the State of Louisiana has a strong interest in maintaining insurance coverage for environmental contamination of its natural resources and insurers should not be allowed to avoid such coverage based on mere technicalities which cause them no harm.

B. The State of Louisiana has a substantial interest in protecting investments by its citizens in policies of insurance.

The ruling of the Fifth Circuit will allow insurers to unfairly deprive Louisiana citizens of their investments in

liability insurance policies. Insurers who have collected high-cost policy premiums from Louisiana citizens for many years will be able to avoid coverage on policies based on a mere delay in notice which caused no harm to the insurer. Insurers should not be allowed to receive a windfall on the policies at the expense of Louisiana citizens.

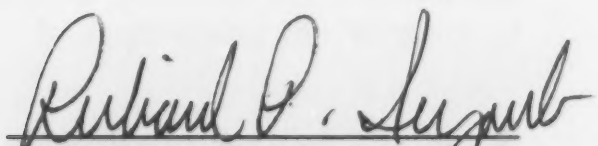
C. The State of Louisiana has a substantial interest in maintaining the integrity of its courts.

The Fifth Circuit's failure to follow Louisiana law undermines the integrity of Louisiana courts. Many insurers who provide liability coverage in Louisiana are not domiciled in this State; therefore, suits filed by Louisiana citizens against their insurers will often be subject to removal to federal court. Federal courts will become a

convenient forum for insurers to avoid Louisiana's long-standing prejudice requirement if the Fifth Circuit decision stands.

III. Conclusion

The Attorney General respectfully requests that this Court grant Joslyn's Petition for Writ of Certiorari, vacate the ruling of the United States Court of Appeals for the Fifth Circuit, and remand this case for reconsideration of Joslyn's motion to certify the question presented herein to the Louisiana Supreme Court.



RICHARD P. IEYOUB (No. 2217)
Attorney General, State of Louisiana
Department of Justice
Post Office Box 94005
Baton Rouge, Louisiana 70804-9005
Telephone: (504) 342-7013
Facsimile: (504) 342-8703

(3)

Supreme Court, U.S.
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JAN 3 1995
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No. 94-978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSLYN MANUFACTURING COMPANY,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

LIBERTY MUTUAL INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MARTHA J. KOSTER
Counsel of Record
LEE H. GLICKENHAUS
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Counsel for Respondent,
Liberty Mutual Insurance Company

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW.

Whether the Fifth Circuit properly applied Louisiana precedent as required by *Erie* v . *Tompkins*, in concluding that an untimely claim was outside the coverage of an insurance policy that required immediate notice of such a claim?

Whether the Fifth Circuit properly exercised its discretion in refusing to certify a case where there is no uncertainty as to applicable state law?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSLYN MANUFACTURING COMPANY,
Petitioner,

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LIBERTY MUTUAL INSURANCE COMPANY,
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LIBERTY MUTUAL INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

For the reasons set forth below, Respondent Liberty Mutual Insurance Company ("Liberty Mutual") respectfully requests that this Court deny the Petition For a Writ of Certiorari filed by Joslyn Manufacturing Company ("Joslyn") to review the decision of the United States Court of Appeals for the Fifth Circuit in the above-captioned case, entered on September 2, 1994.

Statement of the Case.

A. *Factual Background*

This declaratory judgment action arises out of environmental contamination at a wood treating plant once owned by Joslyn in Bossier City, Louisiana. Although Joslyn, in its Petition, begins its factual statement of the regulatory history with the August 2, 1986 Order of the Louisiana Department of Environmental Quality Compliance, the relevant events actually begin well before that. In December, 1985, the DEQ sent Joslyn an information request concerning the Bossier City site in which it stated: "As a former owner and operator we feel that you are a party responsible under La. R.S. 30:1149.13 and 42 U.S.C. § 9607(a) for the cleanup of wastes that have been found at [the Lincoln Creosote] site." (App. A.) Joslyn hired counsel and submitted a response to this letter which, among other things, identified Liberty Mutual as Joslyn's insurance carrier for the site. (App. B).

On or about February 3, 1986, the DEQ issued a Compliance Order in which it concluded that Joslyn was an owner and operator of a facility from which there had been a discharge or disposal of a hazardous substance. On or about February 18, 1986, the DEQ issued an interim Compliance Order to Joslyn. (App. C).

Some months later, on or about August 2, 1986, the DEQ issued a broader Order to Joslyn, directing it to investigate and clean up the site. (Joslyn App. A, 2a-3a). This Order concluded that Joslyn was an "owner", "generator" or "disposer" subject to remedial costs and cleanup liability for hazardous waste disposal sites under both La. R.S. 30:1149.46 and CERCLA.[1] (App. D).

---

[1] Joslyn's characterization of the August 2, 1986 DEQ Order as simply calling upon Joslyn to submit a letter stating whether it would "voluntarily" investigate and clean up the site is disingenuous at best. This Order, which was discussed in the opinion below, clearly *directed* Joslyn to investigate and clean up the site and specified a $50,000 penalty for each day of noncompliance. (App. D).

Joslyn's first notice to Liberty Mutual of *any* of the DEQ Orders came in May, 1987.

B. *Proceedings Below*

Other than Joslyn's statement that "the Fifth Circuit acknowledged that its *MGIC* decision was inconsistent with *Jackson*," an assertion that is contradicted by the opinion below (Petition at page 5), Liberty Mutual adopts Joslyn's statement of the proceedings.

Summary of Argument.

In reaching its decision, the United States Court of Appeals for the Fifth Circuit reviewed and analyzed Louisiana law and its own earlier decisions applying that law. Joslyn disagrees with the Fifth Circuit's construction of Louisiana law and, therefore, argues that the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 69 (1938) has been violated. Further, although it insists that the applicable law is clear as set forth by the Louisiana Supreme Court in *Jackson* v. *State Farm Mutual Auto Ins. Co.*, 23 So.2d 765 (La. App. 1945), *reversed*, 29 So.2d 177 (La. 1946), Joslyn nonetheless argues that the Fifth Circuit should have certified the issue to the Louisiana Supreme Court. The law of Louisiana on this issue is not unclear; it has been articulated by the Louisiana Supreme Court and lower appellate courts and construed on several occasions by the Fifth Circuit. Further, the decision below, although not adopting the extreme view of the controlling law which Joslyn advocates, is wholly consistent with *Jackson*. Thus, the Fifth Circuit has complied with *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

The backbone of Joslyn's argument is that *Jackson* mandates a showing of prejudice to the insurer before coverage for an untimely claim may be denied. This assertion is flatly contra-

dicted by the *Jackson* decision. Rather than laying down any black-letter rules for determining when a policyholder's late notice will bar it from obtaining insurance coverage, *Jackson* identifies a number of factors which a court *may* consider on a case by case basis as part of a balancing of equities to determine whether a policyholder's late notice will bar coverage. While late notice is one factor that may be considered, *Jackson* does not require an insurance company to demonstrate that it was prejudiced by a policyholder's late notice before it may deny coverage.

The Fifth Circuit's decision was not rendered in ignorance or in derogation of *Jackson*; the Fifth Circuit followed and applied *Jackson*. It appropriately considered the facts and circumstances of this case, the equitable factors articulated by *Jackson* and the express language of the insurance policy. Although the *Jackson* court found that coverage in that case was not precluded because of late notice, the Fifth Circuit appropriately distinguished the facts of this case from those of *Jackson* and reached the opposite result. *Erie* requires only that the Fifth Circuit apply the law of Louisiana. The Fifth Circuit complied with that requirement. Merely because the Fifth Circuit reached a different result than *Jackson*, on different facts, does not mean that the Fifth Circuit failed to comply with *Erie*.

Because there is no unsettled question of Louisiana law, and because it properly applied *Jackson*, the court below did not abuse its discretion in refusing to certify this case to the Louisiana Supreme Court. As petitioner has failed to demonstrate any basis for a grant of certiorari, its petition should be denied.

Argument.

I. The Fifth Circuit Applied Louisiana Law In This Case As Required By *Erie*.

The first step in determining whether the Fifth Circuit failed to apply Louisiana law regarding late notice is to ascertain Louisiana law. Joslyn bases its argument solely on its construction of *Jackson*, the only Louisiana Supreme Court case that addresses late notice.

A. *Louisiana Law Does Not Impose A "Prejudice Requirement" On Late Notice Cases.*

Joslyn says that *Jackson* imposes a "prejudice requirement" for an insurer to disclaim coverage as a result of late notice. (Petition at p. 10). This is incorrect. *Jackson* does not hold that an insurer must demonstrate that it was prejudiced by a policyholder's late notice; rather, *Jackson* says that the court "*may* consider" a number of factors, including prejudice, in determining whether coverage is barred. 29 So.2d at 179 (emphasis added). Nowhere does *Jackson* say that prejudice is required to support a denial of coverage for late notice.

The essence of the *Jackson* ruling is a rejection of any *per se* rule in favor of a "balancing the equities" test. *Jackson* specifies that "each case involving delayed notice must stand upon its own facts and circumstances." 29 So.2d at 179. Rather than setting down a strict rule that must be applied mechanistically, *Jackson* identifies factors that a court may consider in balancing the equities and determining whether a particular claim is barred because of late notice.

Central to *Jackson* (and to those Louisiana cases which have followed it) was the Court's view that "the *average citizen* who purchases a public liability policy seldom, if ever, becomes familiar with its detailed provisions. . . ." *Jackson*, 29 So.2d 178 (emphasis added). The rationale of *Jackson* is an equitable one: to protect average consumers who may not be aware of their notice obligations. *Jackson*, like other similar Louisiana appellate court cases, involved individual, as distinct from corporate, policyholders. As a result, the balancing of equities which is central to *Jackson* involved a very different calculus than it did in this case; sophisticated policyholders do not need the extra protection by the courts contemplated by *Jackson*. It is not inequitable to hold such insureds to the terms of the contracts they make. As the Fifth Circuit noted, Joslyn is not an average citizen purchasing an insurance policy, but rather is a sophisticated business entity. As such, it is capable of following the clear condition precedent notice requirement of its policy.

B. *A Balancing Of The Equities As Established By Jackson Supports Enforcement Of The Notice Requirement In Joslyn's Policy.*

The Louisiana Supreme Court in *Jackson* undertook a "balancing of the equities." 29 So.2d 179. In addition to prejudice to the insurer, *Jackson* says that courts may also consider other factors, such as when the insured first discovered that substantial injury had been done or that a claim would be made against it, and the good faith of the insured. *Id.* The *Jackson* court ultimately granted coverage because it found that the insured "had reasonable grounds to believe that no claim would be made [against him] until the [demand of which he first informed his insurance company] was made upon him." *Id.* In *Jackson*, the insured immediately told the insurer about the

claim against him (as opposed to the accident that led to the claim).[2] As the Court below noted, Joslyn waited at least nine months before giving Liberty Mutual notice of the *claim* against it. Indeed, the record before the Fifth Circuit shows that Joslyn was aware of the claim for nearly one and a half *years* before it notified Liberty Mutual.

Under *Jackson*, the good faith of the policyholder is an important factor in balancing the equities. Louisiana courts have excused individual policyholders from compliance with the notice requirement where they have had a good reason for noncompliance. For example, in *Howard* v. *Early Chevrolet-Pontiac-Cadillac, Inc.*, 150 So.2d 309, 312 (La. App. Ct. 2d Cir. 1963), the court found coverage despite late notice. Central to the court's holding was its finding that the policyholders:

> had no intent or reason for withholding notice from the insurer and it was by accident that . . . in talking to an insurance agent, Mrs. Early [plaintiff's wife] discovered the possibility that the policy might afford relief.

In *Howard*, the policyholder's late notice was inadvertent and was rectified as soon as the policyholder learned the facts that would justify a claim. *See also, Reid* v. *Monticello*, 44 So.2d 509, 512 (La. App. Ct. 1st Cir. 1950) (policyholder gave notice "as soon as he knew that he had coverage with the company. He was in perfect and good faith in his delay."); *Davis* v. *Allstate*, 272 So.2d 458 (La. App. Ct. 2d Cir. 1973).

---

[2] As another Louisiana case noted:

> In [*Jackson*] there had been a lapse of eighty-two days between the date of the accident and receipt of notice by the insurer; but the parents of the deceased child had informed the insured at the time of the accident that they would not prosecute a claim, and *as soon as they informed him of their change of intention, he gave notice to the insurer.*

West v. *Monroe Bakery*, 217 La. 189, 46 So.2d 122, 128 (1950). (emphasis added).

("Nowhere is it contended that plaintiff's alleged failure to comply with the terms of the contract was predicated upon fraud or induced by any desire or purpose to mislead defendant or to conceal from it any fact. . . .").[3]

In this case, Joslyn failed to provide notice even though it had more than "reasonable grounds to believe" that a claim would be made against it. Indeed, it knew that a claim had been made against it by the Louisiana DEQ long before it gave notice to Liberty Mutual. Nonetheless, it chose not to inform Liberty Mutual of this claim, despite the fact it had hired a lawyer to represent it, engaged in negotiations with the DEQ and negotiated a consent decree giving the DEQ much of the relief that it sought. Unlike the insureds in the cases cited above, Joslyn was not unaware either of the identity of its insurer or that a claim had been made against it. All of these facts were considered by the Fifth Circuit in accordance with *Jackson*.

C. *The Fifth Circuit Followed* Jackson *And Louisiana Law.*

There is no *per se* rule in Louisiana for determining when coverage should be denied because of a policyholder's delay in giving notice. Rather, *Jackson* identifies factors that a court may consider in balancing the equities. The court below reviewed the factors as set out in *Jackson* and applied them to the facts of this case:

> Our factual scenario requires us to distinguish *Jackson* and follow the precedent laid down in *MGIC*. Unlike the instant case, the insured in *Jackson* had reasonable grounds to believe that no claim would be made until the demand was made upon him. *Jack-*

[3] These cases also involved unsophisticated policyholders.

> *son*, 29 So.2d 177, 179. Additionally, the insured was only eighty-two days tardy in providing the necessary notice, *id.* at 177, as opposed to Joslyn's nine-month delay. And finally, the court in *Jackson* was painstakingly trying to protect the average citizen who purchases a public liability policy without becoming familiar with its detailed provisions, but simply puts it away against the day when a claim may be made against him. *Id.* at 178. Moreover, the claim in *Jackson* was brought by an injured third party against the insurance company. This court adopted the same prejudice inquiry for claims brought pursuant to the Louisiana Direct Action Statute. *See Auster*, 89 F.2d at 578 (holding non-prejudicial delay in notice could not bar recovery by third party claimant under statute). Such is not the case before us. Joslyn is not a third party claimant, but a sophisticated business entity. Consequently, these equitable exceptions do not weigh in this favor.

(Joslyn App. 8a).

Thus, because the notice requirement was a condition precedent to coverage and because Joslyn was not an unsophisticated insured or a third party claimant, and because its notice was nine months late, equitable considerations did not excuse Joslyn's noncompliance with the contract. This result is wholly consistent with *Jackson* and Louisiana law.

The court below relied in part on its earlier decision in *MGIC Indem. Corp.* v. *Central Bank of Monroe, La.*, 838 F.2d 1382 (5th Cir. 1988). *MGIC* held that an insurance carrier was not required to demonstrate prejudice in order to deny coverage on the grounds of late notice where the policyholder was a "sophisticated insured" and its obligation to give timely notice was a "condition precedent" of its insurance policy. The

MGIC court considered Louisiana lower court cases which had required an insurer to show prejudice "where the policyholders were consumers unlikely to be conversant with all the fine print of their policies." *MGIC*, 838 F.2d 1387. The court concluded that the equitable rationale of requiring prejudice did not apply where both parties were sophisticated businesses. *Id.*

Much of Joslyn's petition is devoted to arguing that *MGIC* is inconsistent with Louisiana law. By focusing on *MGIC*, rather than the Fifth Circuit's decision on this case, Joslyn ignores the fact that the Fifth Circuit in this case did not apply a *per se* "condition precedent" rule. In this case, the Fifth Circuit acknowledged that a *per se* "condition precedent" rule was inconsistent with *Jackson*; the court correctly held that *Jackson* required it to consider all the facts and circumstances in "balancing the equities". (Joslyn App. A, 7a). *Jackson* nowhere suggests that the actual language of the policies, including any "condition precedent" language, is not a relevant factor to consider in balancing the equities.

Based on the facts before it, and the factors that *Jackson* directed it to consider, the Fifth Circuit was fully justified in finding that Joslyn's coverage was barred as a result of late notice, even without any showing of prejudice by Liberty Mutual. On the facts before it, the Fifth Circuit was not obligated to require, or even consider, prejudice; certainly *Jackson* does not say otherwise.

II. The Fifth Circuit's Denial Of Joslyn's Motion To Certify Did Not Violate *Erie*.

Joslyn also contends that the Fifth Circuit violated *Erie* by denying Joslyn's motion to certify this case to the Louisiana Supreme Court. Joslyn argues that the Fifth Circuit decided that *Jackson* was not controlling precedent. (Petition at 13). As is

discussed above, this is incorrect; the Fifth Circuit considered and followed *Jackson*. There is no basis for Joslyn's contention that the Fifth Circuit's refusal to certify this question violated *Erie*.

Further, as Joslyn acknowledges, certification is discretionary. Fifth Circuit's determination that certification is inappropriate is clearly within its sound discretion. (Petition at 13). Moreover, certification is generally appropriate only where local law is unsettled. *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974). That is not the case here. As Joslyn strenuously argues, there is a controlling precedent in *Jackson*. There is, thus, no undecided question of state law to be decided by the Louisiana Supreme Court.

What Joslyn seeks to have certified is not a question of law; rather, it wants a different court to undertake the weighing and balancing of the equitable factors identified by *Jackson*. The application of the law to the facts was appropriately undertaken by the courts with jurisdiction in this case. Joslyn has no right to have the performance of such a test abdicated by the Fifth Circuit to the Louisiana Supreme Court.

In this case, there is no doubt as to either the local law or to its application by the Fifth Circuit. Joslyn takes issue only with the Fifth Circuit's application of that law; this is an inappropriate subject for certification. *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974), relied upon by Joslyn, is not to the contrary. In *Lehman Brothers*, this Court found that certification was appropriate because Florida law was unsettled. 416 U.S. 391. In this case, even Joslyn does not claim that Louisiana law is unsettled.

Under the circumstances, there is no basis to conclude that the Fifth Circuit abused its discretion by denying Joslyn's motion to certify. Accordingly, Joslyn's petition should be denied.

Conclusion.

For the foregoing reasons, Liberty Mutual respectfully requests that Court deny Joslyn's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MARTHA J. KOSTER
Counsel of Record
LEE H. GLICKENHAUS
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

Counsel for Respondent,
Liberty Mutual Insurance Company

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APPENDIX A.

EDWIN W. EDWARDS December 6, 1985 PATRICIA L. NORTON

Joslyn Manufacturing and Supply Co.
% C. T. Corporation, Agent for
Service of Process
400 Poydras Street
New Orleans, Louisiana 70130

CERTIFIED MAIL (P181812304)
RETURN RECEIPT REQUESTED

Re: Lincoln Creosoting Facilities,
Bossier City, Louisiana

Gentlemen:

The Louisiana Department of Environmental Quality (DEQ) has a statutory mandate to protect public health and the environment from the adverse effects of hazardous wastes and substances. The Louisiana Environmental Quality Act assigns liability for pollution and contamination and an affirmative duty to take remedial action under its statutes relating to hazardous wastes (R.S. 1148), hazardous substances (R.S. 1149.41) and water pollution control (R.S. 1097). Persons liable under these provisions are not confined to generators, transporters and disposers but include owners, operators and any person who causes, suffers, allows or permits pollution of the environment. The Comprehensive Environmental Response Compensation Liability Act of 1980 (CERCLA), 42 U.S.C. Section 9604(e)(1) requires any person who has been associated with the pollution source or facility, upon the request of the Secretary of the DEQ, to furnish information relating to such waste and activities.

This office has been investigating the waste disposal activities at the facility formally known as the Lincoln Creosoting Company, Inc. ("Lincoln Creosoting"), in Bossier City, Louisiana. We understand that Joslyn Manufacturing and Supply Co. owned and operated this property from August 1, 1950 through December 1, 1969. As a former owner and operator we feel that you are a party responsible under La. R.S. 30:1149.13 and 42 U.S.C. § 9607(a) for the cleanup of wastes that have been found at this site.

DEQ has reason to believe that as a result of your activities, hazardous wastes and hazardous substances have been and continue to be discharged from the site. Accordingly, you are hereby requested to provide information and answers to the following questions:

1. Please state when you purchased and sold the Lincoln Creosoting property, what business purposes the property was used for, and what facilities of businesses you managed or operated on the property.

2. Please identify all known managers and supervisory personnel of your facilities on the Lincoln Creosoting property, the last known address of such persons, the dates of their employ, and their job functions.

3. Please describe your operations and physical facilities at the Lincoln Creosoting property in Bossier City, Louisiana, specifically including but not limited to the following:

    a. What wood treating process or processes did you use (*e.g.*, creosote dipping or pressure treating, pentachlorophenol dipping or pressure treating, or treatment with chromated copper arsenic compounds through dipping or pressure treating)?

b. Please identify the former locations of all dipping, working, or storage tanks.

c. Where did you dispose of materials, especially bottoms, taken from dip tanks?

d. Please describe what actions were taken with respect to any contaminated soil from spilling around dipping or treating tanks.

e. Were dipping tanks or pressure treating cylinders ever repaired, replaced, or abandoned? If so, please provide details in connection therewith.

f. Please describe all sources of wastewater, describe all wastewater treatment facilities and operations, and state where such wastewater was discharged.

g. Please provide information on any and all known spills of treating compounds or other chemicals, including a history of such spills and of any cleanup activities taken in connection therewith.

h. Please describe and identify the location of all retention or sump ponds and creosote or oil recovery systems.

i. Please state the location of all piping and provide details about the capacity and function of such piping. Was such piping above ground or underground? Please state whether such piping was ever repaired, and if so, when and under what circumstances.

j. Please describe your actions with respect to containing or controlling stormwater runoff.

k. What is the generic name and chemical character of all hazardous wastes or hazardous substances that

you generated or disposed of at the Lincoln Creosoting facility?

l. For each hazardous waste or hazardous substance identified above, please give the total volume of such wastes generated during your operation of the facilities, in gallons for liquids and in cubic yards for solids, which you disposed of or caused to be disposed of, and list the date of such activity.

m. What arrangements were made to transport these hazardous wastes or hazardous substances for disposal?

n. Who was responsible for arranging for or disposing of or transporting these hazardous wastes or hazardous substances; what was his or her previous address; and what is his or her current address?

o. Have you or do you know of the disposal of any other materials at the Lincoln Creosoting site which may or may not be hazardous wastes and/or hazardous substances? If so, please describe these materials in sufficient detail to allow the determination to be made as to whether or not these materials are hazardous.

4. Provide a copy of any insurance agreements covering the Lincoln Creosoting facility. If a copy of the agreement is not available, identify the name and address of the insurer and provide a written description of the nature and extent of coverage, along with the policy number and date of issuance and the name of the insured party.

5. Please produce for inspection and copying at this office, within the time allowed for response to this request,

copies of all documents retained by your company relating to Lincoln Creosoting and to your response to the foregoing inquiries.

6. Please state whether you are aware of the existence of any documents relating to the foregoing inquiries that are not in your possession, and, if so, identify their custodian.

7. Please identify the sources of information that you have utilized in responding to this request.

In responding to the foregoing questions, please list the types of documents that are maintained, the date of the documents, the author of the documents, the current location of the documents, and their current custodian. As used herein, the term "document" means writings (handwritten, typed, or otherwise produced or reproduced), and includes, but is not limited to, any invoices, checks, receipts, correspondence, offers, contracts, agreements, manifests, licenses, permits, bids, proposals, policies of insurance, logs, minutes of meetings, memoranda, notes, calendar or diary entries, charts, maps, photographs, drawings, manuals, reports of analysis, analytical work sheets, chromatographs, studies, reports of scientific study or investigation, telegrams, teletypes, magnetic tapes, punch cards, recording discs, computer printouts or other data compilations from which information can be obtained or translated.

Your response to this request must be sent to DEQ within thirty calendar days after receipt of this letter. Failure to comply with this request may result in an order requiring compliance or civil action for appropriate relief. Failure to respond could subject you to administrative and civil penalties. Should you find, at any time after submittal of the requested information, that any portion of the submission is false or incorrect, please notify DEQ.

Please direct your response to my attention.

Very truly yours,

/s/_____
Patricia L. Norton
Secretary

WBD/bhh

cc: Mr. Robert E. Holden
Liskow and Lewis

APPENDIX B.

LISKOW & LEWIS
ATTORNEYS AT LAW

New Orleans, 70139-5099
February 7, 1986

Department of Environmental Quality
State of Louisiana
Post Office Box 44307
Baton Rouge, LA 70804
Attn: William B. DeVille

VIS U.S. EXPRESSMAIL

Re: Lincoln Creosoting Facility
Bossier City, Louisiana

Dear Sirs:

This letter is the response of Joslyn Corporation to the information request of the Department of Environmental Quality (DEQ), dated December 6, 1985, directed to "Joslyn Manufacturing & Supply Company." Joslyn's response to each of the questions is set forth below:

Question No. 1: Please state when you purchased and sold the Lincoln Creosoting property, what business purpose the property was used for, and what facilities or businesses you managed or operated on the property.

Response to Question No. 1: Joslyn purchased the Lincoln Creosoting property on August 1, 1950, from the Lincoln Creosoting Company, Inc. On information and belief, Joslyn avers that T.L. James & Company was at all relevant times the controlling shareholder in Lincoln Creosoting Company.

On December 1, 1969, Joslyn sold this property to Koppers Company, Inc. As part of the conveyance, Joslyn conveyed to Koppers all working tanks, storage tanks, treating cylinders, piping and related immovables, as well as all treatment chemicals in storage and all residual chemicals in such equipment to Koppers, except that Joslyn retained ownership of approximately 8000 gallons of creosote oil.

At all times that it owned the plant, Joslyn used the property as the site of a wood preserving plant.

Question No. 2: Please identify all known managers and supervisory personnel on your facilities on the Lincoln Creosoting property, the last known address of such persons, the dates of their employ, and their job functions.

Response to Question No. 2:

George Bauer
309 Woodbine Drive
Shreveport, Louisiana 71105
Employed by Joslyn from 1946 through 1980. Mr. Bauer was the plant manager of the Bossier City Treating Plant from 1950 through 1963.

Lester Tschannen
address unknown
Plant manager in 1967.

L. B. Polzin (deceased)
Mr. Polzin was the plant superintendent at the Bossier City plant from 1949 through 1961.

Irving Kueker
1007 Riding Club Lane
Shreveport, Louisiana 71118
Mr. Kueker was the maintenance supervisor at the Bossier City plant from 1959 through 1969.

William Guyton (deceased)
Mr. Guyton was the Plant Manager for some time uncertain between 1963 and 1969.

Al Tucker (deceased)
Mr. Tucker was the Plant Manager at the Bossier City facility for some time between 1963 and 1969.

Sherman T. Fisher
2642 Randolph Street
Shreveport, LA 71109
Mr. Fisher was the Plant Superintendent from 1962 through 1969.

Question No. 3: Please describe your operations and physical facilities at the Lincoln Creosoting property in Bossier City, Louisiana, specifically including, but not limited to, the following:

a. What wood treating process or processes did you use (e.g., creosote dipping or pressure treating, pentachlorophenol dipping or pressure treating, or treatment with chromated copper arsenic compounds through dipping or pressure treating)?

Response to Question No. 3(a): Joslyn used Creosote pressure treating from 1950 to 1969; pentachlorophenol (PCP) pressure treating from 1960 through 1969; and chromated arsenic copper solution (CAC) from 1964 to 1969.

Question No. 3(b): Please identify the former locations of all dipping, working, or storage tanks.

Response to Question No. 3(b): Joslyn had four storage tanks on the west property line; four working tanks, two on the northwest corner of the treating plant building, and two on the northeast corner of the treating plant building; four treating cylinders in the plant building; one rueping tank directly south of the treatment plant building. The attached Figures "A" and "B" show each of these locations.

Question No. 3(c): Where did you dispose of materials, especially bottoms, taken from dip tanks?

Response to Question No. 3(c): Joslyn did not use dip tanks, but instead used pressure treating cylinders. Creosote and PCP

treating generated some sludges in the working tanks and pressure treating cylinders. CAC treatment did not generate sludges, and was operated as a closed system without the generation of waste materials. Creosote sludge was used to pave the roadbed leading to the plant, it was spread as a defoliant in the working areas of the plant to control weeds; some was buried in the "framing" area of the plant; some was given to Mr. Harland Beene for use on his plantation roads; some was taken for disposal to the city dump; and some was disposed of by an unknown waste disposal firm.

Question No. 3(d): Please descibe what actions were taken with respect to any contaminated soil from spilling around dipping or treating tanks.

Response to Question No. 3(d): A concrete lined sump underneath the treating cylinders prevented soil contamination around the treating cylinders.

Question No. 3(e): Were dipping tanks or pressure treating cylinders ever repaired, replaced, or abandoned? If so, please provide details in connection therewith.

Response to Question No. 3(e): Treating cylinders were regularly repaired. In the mid-1950s, two were replaced entirely. The old cylinders were cut up for scrap metal, and replaced with two new cylinders. Sludge in the replaced cylinders, if any, would have been handled routinely.

Question No. 3(f): Please describe all sources of wastewater, describe all wastewater treatment facilities and operations, and state where such wastewater was discharged.

Response to Question No. 3(f): All process wastewater was routed to the concrete lined sump (*e.g.*, drains and drippings from all four treatment cylinders). Creosote is heavier than water and would settle to the bottom of the sump. That creosote

was recycled. The sump was present when Joslyn bought the facility from Lincoln Creosoting Company. At the time of purchase, the overflow wasterwater from the sump ran into a ditch that ran along the south property line of the property. That ditch drained into a slough on the property. At the time of purchase, there were heavy accumulations of creosote in the ditch lining and in the slough.

In approximately 1952 to 1953, Joslyn began improving the wastewater treatment system. In 1954 Joslyn installed a 30,000-gallon (approximate) settling tank as a secondary treatment system. This tank was installed in series with the sump. This tank had one baffle, dividing the tank into two compartments for creosote recovery. Some time later, also in approximately 1954, Joslyn put in another 10,000-gallon settling tank and installed three baffles to allow sequential settling and recovery of the creosote in two compartments. This tank was installed in series behind the 30,000-gallon settling tank and the sump. The water in the third stage of the second settling tank went directly into the south ditch.

About 1960, when Joslyn began using PCP, it installed a small settling pond in series with the other equipment. The pond was divided into three compartments with the first two larger than the third. PCP is lighter than water, and was therefore skimmed and recovered from the top of the first compartment. As with the other stages of the treatment system, creosote was recovered from the bottom of all compartments.

Question No. 3(g): Please provide information on any and all known spills of treating compounds or other chemicals, including a history of such spills and of any cleanup activities taken in connection therewith.

Response to Question No. 3(g): Any spills went directly into the sump underneath the treating cylinders. On information and belief, however, Joslyn is aware that Lincoln Creosoting

had a major fire during World War II which may have involved a spill of some type.

Question to No. 3(h): Please describe and identify the location of all retention or sump ponds and creosote or oil recovery systems.

Response to Question No. 3(h): See the attached Figures "A" and "B".

Question No. 3(i): Please state the location of all piping and provide details about the capacity and function of such piping. Was such piping above ground or underground? Please state whether such piping was ever repaired, and if so, when and under what circumstances?

Response to Question No. 3(i): Most piping was overhead. Steam pipes from the boiler room to the treating cylinder were 8-inch overhead pipes. All recovery tanks, storage tanks, and treating cylinders were connected with pipes. The pipes from the storage tanks to the treating plant were underground. There were no direct pipes from the storage tanks to the treating cylinders. The pipes led from the storage tanks to the working tanks (two-inch pipes) and from the working tanks to the treating system (six-inch pipes). The sump and baffle system piping was six inches. Most other piping was four inches.

Piping was regularly repaired. Valves and elbows were replaced as necessary as part of routine maintenance.

Question No. 3(j): Please describe your actions with respect to containing or controlling stormwater runoff.

Response to Question No. 3(j): The plant had drainage ditches to the north and south of the plant. Joslyn maintained its "white yard" (for untreated wood) on the north side of the yard, and any storm water drainage on the north ditch would have been uncontaminated. The south ditch, as noted above,

was lined with heavy deposits of creosote at the time of purchase and led to a slough on the eastern side of the property. Shortly after Joslyn purchased the Bossier City plant, an accidental fire ignited a pond in that slough. Joslyn installed a drainage ditch to bypass the slough. That drainage ditch led storm water and treated wastewater off the facility property to parish drainage ditches.

Question No. 3(k): What is the generic name and chemical character of all hazardous waste or hazardous substances that you generated or disposed of at the Lincoln Creosoting Facility?

Response to Question No. 3(k): Creosote and PCP sludges.

Question No. 3(l): For each hazardous waste or hazardous substance identified above, please give the total volume of such waste generated during your operation of the facilities, in gallons for liquids and in cubic yards for solids, which you disposed of or caused to be disposed of, and list the date of such activity.

Response to Question No. 3(l): Joslyn cannot develop any reasonable estimates of the amount of waste generated. Such waste was generated from 1950 through 1969.

Question No. 3(m): What arrangements were made to transport these hazardous wastes or hazardous substances for disposal?

Response to Question No. 3(m): On-site waste sludge was transported with regular plant equipment. It would have been transported in a large box rather than in barrels or drums. Joslyn may have sent some waste sludge in its own trucks to the city dump. A private waste disposal firm was used to dispose of some waste; the name of such firm is unknown. Mr. Beene transported some waste sludge in his own dump trucks to his property.

Question No. 3(n): Who was responsible for arranging for or disposing of or transporting these hazardous wastes or hazardous substances; what was his or her previous address; and what is his or her current address?

Response to Question No. 3(n): The Joslyn plant managers were responsible for these functions.

Question No. 3(o): Have you or do you know of the disposal of any other materials at the Lincoln Creosoting site which may or may not be hazardous waste and/or hazardous substances? If so, please describe these materials in sufficient detail to allow the determination to be made as to whether or not these materials are hazardous.

Response to Question No. 3(o): Sawdust, wood shavings, and scrap bark from untreated wood. Office and yard trash would have been disposed of off-site.

Question No. 4: Provide a copy of any insurance agreements covering the Lincoln Creosoting Facility. If a copy of the agreement is not available, identify the name and address of the insurer and provide a written description of the nature and extent of coverage, along with the policy number and date of issuance and the name of the insured party.

Response to Question No. 4: Liberty Mutual Insurance Co., 230 West Monroe St., Chicago, Ill. 60606 (CGL policy, limits, policy numbers, and dated unknown). Copies of the insurance agreements are unavailable.

Questino No. 5: Please produce for inspection and copying at this office, within the time allowed for response to this request, copies of all documents retained by your company relating to Lincoln Creosoting and to your responses to the foregoing inquires.

Response to Question No. 5: Joslyn has the following records relating to the Lincoln Creosoting facility:

1. Three photographs from the 1950s (reproductions are attached)
2. Dun and Bradstreet, Lincoln Creosoting Company, Inc., Supplement to Report of August 31, 1949, May 15, 1950.
3. Dun and Bradstreet, Inc., Memorandum, May 5, 1950.
4. Dun and Bradstreet, Inc., Financial Statement Interim Report, Lincoln Creosoting Company, Inc., April 25, 1950.
5. Financial Statement Interim Continuous Service Report, Lincoln Creosoting Company, Inc., September 1, 1949.
6. Dun and Bradstreet, Inc., Mercantile Credit Report, Lincoln Creosoting Company, Inc., August 31, 1949.
7. Dun and Bradstreet, Inc., Specialized Report, Supplement to Report of 8/23/48, Lincoln Creosoting Company, Inc., April 5, 1949.
8. Dun and Bradstreet, Specialized Report, Lincoln Creosoting Company, Inc., August 23, 1948.
9. Dun and Bradstreet, Inc., Memorandum Re: Lincoln Creosoting Company, Inc., March 18, 1948.
10. Dun and Bradstreet, Inc., Specialized Report, Supplement to Report of 6/16/47, Lincoln Creosoting Company, Inc., February 6, 1948.

11. Dun and Bradstreet, Inc., Specialized Report, Lincoln Creosoting Company, Inc., June 16, 1947.

12. Bill of Sale between Joslyn Manufacturing & Supply Company and Koppers Company, Inc., December 1, 1969.

13. Act of Sale by Joslyn Manufacturing and Supply Company to Koppers Company, Inc., December 9, 1969.

14. Memorandum of Agreement between Joslyn Manufacturing & Supply Company and Lincoln Creosoting Company, Inc., July 24, 1950.

15. Deed of Conveyance from Lincoln Creosoting Company, Inc., to Joslyn Manufacturing & Supply Company, August 1, 1950.

16. Map, Joslyn Mfg., Bossier, La., June 26, 1968.

Items 1-15 are attached. A copy of item 16 is being made and will be forwarded to the State promptly.

Question No. 6: Please state whether you are aware of the existence of any documents relating to the foregoing inquiries that are not in your possession, and, if so, identify their custodian.

Response to Question No. 6: Joslyn is unaware of the existence of any documents relating to the foregoing inquiries that are not in its possession.

Question No. 7: Please identify the sources of information that you have utilized in responding to this request.

Response to Question No. 7: Recollection of Mr. George Bauer, Mr. Irvin G. Kueker and Mr. Walter Schoenholz.

We hope this information will be of assistance to you.

Yours very truly,

/s/_____
Robert E. Holden
Counsel for Joslyn Corporation

REH/wp/182

cc: Patricia L. Norton, Secretary
Department of Environmental Quality
Post Office Box 44066
Baton Rouge, LA 70804

bcc: Wayne Koprowski, Esq.

APPENDIX C.

STATE OF LOUISIANA

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF LINCOLN
CREOSOTING FACILITIES,
BOSSIER CITY, LOUISIANA

PROCEEDINGS UNDER THE LOUISIANA
ENVIRONMENTAL QUALITY ACT,
LA. R.S. 30:1051 ET SEQ., AND
THE COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION,
AND LIABILITY ACT,
42 U.S.C. § 9601 ET SEQ.

COMPLIANCE ORDER

The following COMPLIANCE ORDER is issued by the Secretary, Department of Environmental Quality, State of Louisiana, under the authority granted in the Louisiana Environmental Quality Act, La. R.S. 30:1051 *et seq.* (hereinafter referred to as "the Act"), and particularly Sections 30:1147.1, 30:1097 and 30:1149.95 of the Act, and under the authority granted in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9061 *et seq.* (hereinafter "CERCLA"), and particularly 42 U.S.C. § 9607(a):

I.

This COMPLIANCE ORDER is issued to the following named Respondents:

A. T. L. James and Company, Inc., through its agent for service of process, G. L. Dyson, 106 West Mississippi Avenue, Ruston, Louisiana 71270;

B. Joslyn Corporation, through its attorneys, J. Berry St. John, Jr., and Robert E. Holden, Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana 70139;

C. Koppers Company, Inc., through its agent for service of process, C. T. Corporation System, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112;

D. David Myatt, whose address is P.O. Box 8098, Shreveport, Louisiana 71148;

E. Lowell T. Shoemaker, whose address is 150 Jordan Street, Shreveport, Louisiana 71101;

F. Herman K. Beebe, whose address is 6001 Financial Plaza, Shreveport, Louisiana 71130;

G. Mid-South Securities, Inc., through its agent for service of process, James Adams, 6001 Financial Plaza, Shreveport, Louisiana 71130;

H. Powerline Supply Company, through its agent for service of process, William M. Elliott, 2116 California Drive, Bossier City, Louisiana 70011;

I. Lance D. Alworth, whose address is 990 Highland Drive, Suite 300, Solana Beach, California 92075;

J. Louisiana and Arkansas Railway Company, through its agent for service of process, A. R. Carmody, Jr., Beck Building, Seventeenth Floor, Shreveport, Louisiana 71102;

K. Mr. Francis P. Grigsby, whose address is 323 Hamilton Road, Bossier City, Louisiana 71111; and

L. Mr. Wesley D. Burdine, whose address is 323 Hamilton Road, Bossier City, Louisiana 71111.

Findings of Fact.

I.

The discharge or disposal of hazardous substances has occurred at the facility formerly known as the Lincoln Creosoting Company, Inc., in Bossier City, Louisiana. This property is located in Section 21, Township 18 North, Range 13 West, Bossier Parish in an area historically known as the "Cloverdale Farm" (see attached Figure 1).

II.

The condition of the Lincoln Creosoting facility is evidenced by the study prepared for the Department by C-K Associates, Inc., entitled "Emergency Site Investigations, Lincoln Creosote Facilities, Bossier City, Louisiana", dated October 14, 1985. This document is available for review at the Inactive and Abandoned Sites Division of the Department of Environmental Quality, Baton Route, Louisiana.

III.

Based on the information presented in the C-K Associates report, the Department is of the opinion that the hazardous substances discharge or disposal at Lincoln Creosoting may present an immiment and substantial endangerment to the health of those persons who may inadvertently come into contact with such substances. In the opinion of the Department, the potential risks associated with possible inadvertent contact with such substances necessitates construction of a fence to prevent unauthorized access.

IV.

Investigation by the Department has shown that T. L. James and Company was the controlling shareholder of Lincoln Creo-

soting from 1935 through the time of Lincoln Creosoting's sale of its facilities to Joslyn Manufacturing and Supply Company on August 1, 1950.

V.

Joslyn Manufacturing and Supply Company owned and operated the Lincoln Creosoting facility from August 1, 1950, through December 1, 1969, when it was sold to Koppers Company.

VI.

Koppers Company owned and operated the facility from December 1, 1969, through January 5, 1971, and dismantled all manufacturing operations. On January 5, 1971 Koppers Company sold the property to the Myatt family.

VII.

The Myatt family owned the property from January 5, 1971, through January 18, 1971, when it was sold to the Pollad family.

VIII.

The Pollard family owned the property from January 18, 1971, through May 14, 1971, when it was sold to Lowell T. Shoemaker.

IX.

Louisiana and Arkansas Railway Company owned property adjoining the facility from May 29, 1923 through March 3, 1972, and provided rail service to the facility. The property owned by Louisiana and Arkansas Railway Company is contaminated and is part of the "Site" which requires remedial action.

X.

Lowell T. Shoemaker purchased the Lincoln Creosoting property (Paragraph VIII) from the Pollard family on May 14, 1971. On March 3, 1972, Lowell T. Shoemaker purchased the adjoining property owned by the Louisiana and Arkansas Railway Company (Paragraph IX). On March 13, 1975, Lowell T. Shoemaker sold both parcels to Herman K. Beebe.

XI.

Herman K. Beebe owned said property from March 13, 1975, through October 11, 1977, at which time he sold it to Mid-South Securities, Inc.

XII.

Mid-South Securities owned the property from October 11, 1977 when it was subdivided to the following parties:

A. Francis P. Grigsby and Wesley D. Burdine jointly purchased Lots 1-A and 2-A on December 11, 1985. On January 10, 1986, Wesley D. Burdine sold his interest to Francis P. Grigsby. Francis P. Grigsby is the current owner of Lots 1-A and 2-A, of the Lincoln Creosoting Facility.

B. Powerline Supply Company purchased Lots 1-B and 2-B of the Lincoln Creosoting Facility, on August 23, 1982, and is the current owner.

C. Lance D. Alworth purchased Lots 1-C of the Lincoln Creosoting Facility, on April 15, 1983, and is the current owner.

XIII.

The property listed in Paragraph XII, A-C constitutes the areas containing hazardous waste which require immediate remedial action and is referred to herein as the "Site".

Findings of Law.

I.

The foregoing respondents are "owners and operators" of disposal facilities or "generators" of hazardous substances subject to liability for cleanup and remedial cost under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607.

II.

The foregoing respondents are "generators" or "disposers" subject to remedial costs and cleanup liability for hazardous waste disposal sites under Louisiana Environmental Quality Act, La. R.S. 30:1149.46(A).

III.

The construction of a fence around the Site (that land which originally was the Lincoln Creosoting and the Louisiana and Arkansas Railway Company properties) is a "remedial action" consistent with the National Contingency Plan established under CERCLA.

IV.

The cost of the construction of a fence around the Site is a "remedial cost" under La. R.S. 30:1149.42(9)(a).

Compliance Order

Based on the foregoing FINDINGS OF FACT and FINDINGS OF LAW, the respondents are hereby ORDERED:

I.

To submit to the Department within thirty (30) days after receipt of this ORDER, a plan to fence the Site as defined in Paragraphs XII. A - C of this document.

II.

To complete fencing within sixty (60) days after receipt of this ORDER.

III.

To be hereby notified that respondent's refusal to comply with this ORDER and the provisions herein will subject the respondents to possible enforcement procedures under Section 1073 of the Act which could result in the assessment of civil penalties in an amount not to exceed $50,000 for each day of continued non-compliance.

IV.

To be further notified that the Department expects the respondents to communicate with each other and cooperate in formulating a Site security plan and in executing that plan. The Department will use its full authority to compel all responsible parties to contribute their fair share towards the development of and execution of the Site security plan. Full compliance by one or more parties with the terms of this ORDER will not excuse non-compliance by other responsible parties, and such failure to comply with this ORDER shall be deemed to be a continuing violation.

This COMPLIANCE ORDER is effective on date of issuance.

DONE AT BATON ROUGE, LOUISIANA, THIS 3RD DAY OF FEBRUARY, 1986.

/s/_____

Patricia L. Norton, Secretary
Department of Environmental Quality

All correspondence should be addressed to:

Department of Environmental Quality
Inactive and Abandoned Sites Division
Mr. William B. De Ville, Administrator
P. O. Box 44307
Baton Rouge, Louisiana 70804
Telephone: (504) 342-8925

APPENDIX D.

STATE OF LOUISIANA

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF LINCOLN
CREOSOTING FACILITIES,
BOSSIER CITY, LOUISIANA

PROCEEDINGS UNDER THE LOUISIANA
ENVIRONMENTAL QUALITY ACT,
LA. R.S. 30:1051 ET SEQ., AND
THE COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION,
AND LIABILITY ACT,
42 U.S.C. § 9601 ET SEQ.

COMPLIANCE ORDER

The following COMPLIANCE ORDER is issued by the Secretary, Department of Environmental Quality, State of Louisiana, under the authority granted in the Louisiana Environmental Quality Act, La. R.S. 30:1051 *et seq.* (hereinafter referred to as "the Act"), and particularly Sections 30:1147.1, 30:1097 and 30:1149.95 of the Act, and under the authority granted in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9061 *et seq.* (hereinafter "CERCLA"), and particularly 42 U.S.C. § 9607(a):

I.

This COMPLIANCE ORDER is issued to the following named Respondents:

A. Graham W. Rogers, whose address is P.O. Box 5832, Bossier City, Louisiana 71111;

B. Stephen A. Sipes, Jr., whose address is 10612 Deer Path, Shreveport, Louisiana 71115;

C. John Walker Price, whose address is 735 Kings Highway, Shreveport, Louisiana 71104; and

D. R. Lee Harvill, whose address is 3001 Old Minden Road, Bossier City, Louisiana 71111.

II.

COMPLIANCE ORDERS have also been issued to the following named respondents on February 3, 1986:

A. T. L. James and Company, Inc., through its agent for service of process, G. L. Dyson, 106 West Mississippi Ruston, Louisiana 71270;

B. Joslyn Corporation, through its attorneys, J. Berry St. John, Jr., and Robert E. Holden, Liskow & Lewis, 50th Floor, One Shell Square, New Orleans, Louisiana 70139;

C. Koppers Company, Inc., through its agent for service of process, C. T. Corporation System, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112;

D. David Myatt, whose address is P.O. Box 8098, Shreveport, Louisiana 71148;

E. Lowell T. Shoemaker, whose address is 350 Jordan Street, Shreveport, Louisiana 71101;

F. Herman K. Beebe, whose address is 6001 Financial Plaza, Shreveport, Louisiana 71130;

G. Mid-South Securities, Inc., through its agent for service of process, James Adams, 6001 Financial Plaza, Shreveport, Louisiana 71130;

H. Powerline Supply Company, through its agent for service of process, William M. Elliott, 2116 California Drive, Bossier City, Louisiana 70011;

I. Lance D. Alworth, whose address is 990 Highland Drive, Suite 300, Solana Beach, California 92075;

J. Louisiana and Arkansas Railway Company, through its agent for service of process, A. R. Carmody, Jr., Beck Building, Seventeenth Floor, Shreveport, Louisiana 71102;

K. Mr. Francis P. Grigsby, whose address is 323 Hamilton Road, Bossier City, Louisiana 71111; and

L. Mr. Wesley D. Burdine, whose address is 323 Hamilton Road, Bossier City, Louisiana 71111.

Findings of Fact.

The discharge or disposal of hazardous substances has occurred at the facility formerly known as the Lincoln Creosoting Company, Inc., in Bossier City, Louisiana. This property is located in Section 21, Township 18 North, Range 13 West, Bossier Parish in an area historically known as the "Cloverdale Farm" (see attached Figure 1).

II.

The condition of the Lincoln Creosoting facility is evidenced by the study prepared for the Department by C-K Associates, Inc., entitled "Emergency Site Investigations, Lincoln Creosoting Facilities, Bossier City, Louisiana", dated October 4, 1985. This document is available for review at the Inactive and Abandoned Sites Division of the Department of Environmental Quality, Baton Rouge, Louisiana.

III.

Based on the information presented in the C-K Associates report, the Department is of the opinion that the hazardous substances discharge or disposal at Lincoln Creosoting may present an imminent and substantial endangerment to the health of those persons who may inadvertently come into contact with such substances. In the opinion of the Department, the potential risks associated with possible inadvertent contact with such substances necessitates construction of a fence to prevent unauthorized access.

IV.

Investigation by the Department has shown that T. L. James and Company was the controlling shareholder of Lincoln Creosoting from 1935 through the time of Lincoln Creosoting's sale of its facilities to Joslyn Manufacturing and Supply Company on August 1, 1950.

V.

Joslyn Manufacturing and Supply Company owned and operated the Lincoln Creosoting facility from August 1, 1950 through December 1, 1969, when it was sold to Koppers Company.

VI.

Koppers Company owned and operated the facility from December 1, 1969 through January 5, 1971, and dismantled all manufacturing operations. On January 5, 1971 Koppers Company sold the property to the Myatt family.

VII.

The Myatt family owned the property from January 5, 1971 through January 18, 1971, when it was sold to the Pollard family.

VIII.

The Pollard family owned the property from January 18, 1971 through May 14, 1971, when it was sold to Lowell T. Shoemaker.

IX.

Louisiana and Arkansas Railway Company owned property adjoining the facility from May 29, 1923 through March 3, 1972, and provided all rail service to the facility. The property owned by Louisiana and Arkansas Railway Company is contaminated and is part of the "Site" which requires remedial action.

X.

Lowell T. Shoemaker purchased the Lincoln Creosoting property (Paragraph VIII) from the Pollard family on May 14, 1971. On March 3, 1972, Lowell T. Shoemaker purchased the adjoining property owned by the Louisiana and Arkansas Railway Company (Paragraph IX). On March 23, 1975, Lowell T. Shoemaker sold both parcels to Herman K. Beebe.

XI.

Herman K. Beebe owned said property from March 13, 1975 through October 11, 1977, at which time he sold it to Mid-South Securities, Inc.

XII.

Mid-South Securities owned the property from October 11, 1977 when it was subdivided and conveyed to the following parties:

A. Francis P. Grigsby and Wesley D. Burdine jointly purchased Lots 1-A and 2-A on December 11, 1985. On January 10, 1086, Wesley D. Burdine sold his interest to Francis P. Grigsby. On the same date, Francis P. Grigsby sold complete interest to Graham W. Rogers, Stephen A. Sipes, Jr., John Walker Price and R. Lee Harvill, who are the current owners.

B. Powerline Supply Company purchased Lots 1-B and 2-B of the Lincoln Creosoting Facility on August 23, 1982, and is the current owner.

C. Lance D. Alworth purchased Lot 1-C of the Lincoln Creosoting Facility on April 15, 1983, and is the current owner.

XIII.

The property listed in Paragraph XII. A-C constitutes the areas containing hazardous waste which require immediate remedial action and is referred to herein as the "Site".

Findings of Law.

I.

The foregoing respondents are "owners and operators" of disposal facilities or "generators" of hazardous substances subject to liability for cleanup and remedial cost under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607.

II.

The foregoing respondents are "generators" or "disposers" subject to remedial costs and cleanup liability for hazardous waste disposal sites under Louisiana Environmental Quality Act, La. R.S. 30:1149.46(A).

III.

The construction of a fence around the Site (that land which originally was the Lincoln Creosoting and the Louisiana and Arkansas Railway Company properties) is a "remedial action" consistent with the National Contingency Plan established under CERCLA.

IV.

The cost of the construction of a fence around the Site is a "remedial cost" under La. R.S. 30:1149.42(9)(a).

Compliance Order.

Based on the foregoing FINDINGS OF FACT and FINDINGS OF LAW, the respondents are hereby ORDERED:

I.

To submit to the Department within thirty (30) days after receipt of this ORDER, a plan to fence the Site as defined in Paragraph XII. A - C of this document.

II.

To complete fencing within sixty (60) days after receipt of this ORDER.

III.

To be hereby notified that respondent's refusal to comply with this ORDER and the provisions herein will subject the respondents to possible enforcement procedures under Section 1073 of the Act which could result in the assessment of civil penalties in an amount not to exceed $50,000 for each day of continued non-compliance.

IV.

To be further notified that the Department expects the respondents to communicate with each other and cooperate in formulating a Site security plan and in executing that plan. The Department will use its full authority to compel all responsible parties to contribute their fair share towards the development of and execution of the Site security plan. Full compliance by one or more parties with the terms of this ORDER will not excuse non-compliance by other responsible parties, and such failure to comply with this ORDER shall be deemed to be a continuing violation.

This COMPLIANCE ORDER is effective on date of issuance.

/s/_____

Patricia L. Norton, Secretary
Department of Environmental Quality

All correspondence should be addressed to:

Department of Environmental Quality
Inactive and Abandoned Sites Division
Mr. William B. De Ville, Administrator
P. O. Box 44307
Baton Rouge, Louisiana 70804
Telephone: (504) 342-8925

A35

STATE OF LOUISIANA

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:
LINCOLN CREOSOTING FACILITIES,
BOSSIER CITY, LOUISIANA

COMPLIANCE ORDER

PROCEEDINGS UNDER THE LOUISIANA
ENVIRONMENTAL QUALITY ACT,
LA. R.S. 30:1051 ET SEQ.

The following COMPLIANCE ORDER is issued by the Secretary, Department of Environmental Quality, State of Louisiana, under the authority granted in the Louisiana Environmental Quality Act, La. R.S. 30:1051 *et seq*. (hereinafter referred to as "the Act"), and particularly Sections 30:1097, 30:1147.1, 30:1148, 30:1149.45 and 30:1149.46 of the the Act.

I.

This COMPLIANCE ORDER is issued to the following named Respondents:

A. Eagle Timber Co., Inc., through its agent for service of process, J. Ransdell Keene, Esq. of Evans, Keene & Mills Law Center, 331 Milam Street, P.O. Box 1784, Shreveport, Louisiana 71166.

B. Powerline Supply Company, through its attorney, Albert M. Hand, Jr., Esq. of Cook, Yancey, King & Galloway, 400 American Tower, Shreveport, Louisiana 71101.

C. Louisiana and Arkansas Railroad, through its agent for service of process, Bobby S. Gilliam, Esq., of

Wilkinson, Carmody and Gilliam, 1700 Beck Building, Shreveport, Louisiana 71166.

D. Lance Alworth, through his attorney, Albert M. Hand, Jr., Esq., of Cook, Yancey, King & Galloway, 400 American Tower, Shreveport, Louisiana 71101.

E. Mid-South Securities, through its agent for service of process, Arthur A. Vingiello, Esq., of Anderson & Adams, 5555 Hilton Avenue, 5th Floor, Baton Rouge, Louisiana 70808.

F. Francis P. Grigsby, whose address is 323 Hamilton Road, Bossier City, Louisiana 71111.

G. Wesley D. Burdine, through his attorney, Arthur A. Vingiello, Esq., of Anderson & Adams, 5555 Hilton Avenue, 5th Floor, Baton Rouge, Louisiana 70808.

H. Herman K. Beebe, through his attorney, Arthur A. Vingiello, Esq., of Anderson & Adams, 5555 Hilton Avenue, 5th Floor, Baton Rouge, Louisiana 70808.

I. L. D. Myatt, through his attorney, Albert M. Hand, Jr., of Cook, Yancey, King & Galloway, 400 American Tower, Shreveport, Louisiana 71101.

J. Lowell T. Shoemaker, whose address is 350 Jordan Street, Shreveport, Louisiana 71101.

K. Koppers Company, through its agent for service of process, Roger Sketter, Esq., of Lemle, Kelleher, Kohlmeyer, Hunley & Frilot, Pan American Life Center, New Orleans, Louisiana 70130.

L. Joslyn Corporation, through its agent for service of process, Robert E. Holden, of Liskow & Lewis, One Shell Square, New Orleans, Louisiana 70139.

M. T. L. James and Company, Inc., through its agent for service of process, Robert G. Dawkins, Esq. of Dawkins, Esq., of Dawkins, Coyle & Carter, 102 West Alabama Avenue, Ruston, Louisiana 71270.

Findings of Fact.

I.

The discharge or disposal of hazardous substances has occurred at the facility formerly known as the Lincoln Creosoting Company, Inc., in Bossier City, Louisiana. This property is located in Section 21, Township 18 North, Range 13 West, Bossier Parish in an area historically known as the "Cloverdale Farm", subdivided and renamed Hall Subdivision, Lots A-C, and referred to herein as "The Site".

II.

The condition of the Lincoln Creosoting Facility is evidenced by the study prepared for the Department by C-K Associates, Inc., entitled "Emergency Site Investigations, Lincoln Creosote Facilities, Bossier City, Louisiana", dated October 14, 1985. This document is available for review at the Inactive and Abandoned Sites Division of the Department of Environmental Quality, Baton Rouge, Louisiana.

III.

Based on the information presented in the C-K Associates report, the Department is of the opinion that the hazardous substances discharge or disposal at Lincoln Creosoting may present an imminent and substantial endangerment to the health of those persons who may come into contact with such substances.

IV.

The potential risks associated with contact with such substances necessitated construction of a chain-link fence enclosing a portion of the above site to prevent unauthorized access. This construction was completed in April, 1986, with costs incurred by the Respondents of the Compliance Order, dated on or about February 3, 1986.

V.

Eagle Timber Co., Inc. purchased Logs 1-A and 2-A from Francis P. Grigsby on July 17, 1986, after the Act of Sale, dated January 10, 1986, between Francis P. Grigsby and Graham Rogers, Stephen Sipes, John Walker Price and R. Lee Harvill was rescinded in judgment on the same date.

VI.

Respondents named in this Order and lettered "B" through "M" were identified and declared as Potential Responsible Parties in the Compliance Order dated February 3, 1986.

VII.

On February 21, 1986, a legal notice advising the general public of activities relating to the site was published in the Shreveport Journal, the official journal of the region.

VIII.

A "CEASE AND DESIST ORDER" dated July 21, 1986, was issued to Eagle Timber Co., Inc., forbidding the company or anyone acting on its behalf from entering the site unless accompanied by a Louisiana Department of Environmental Quality representative.

Conclusions of Law.

The foregoing respondents are "owners", "operators", "generators", and/or "disposers" subject to remedial and cleanup liability for hazardous waste disposal sites under the Louisiana Environmental Quality Act, La. R. S. 30:1149.46. (See also the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607).

Compliance Order.

Based on the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Respondents are hereby ORDERED:

I.

To submit to the Department within thirty (30) days from the date of execution of this ORDER, a letter indicating whether Respondent will comply with this ORDER. Compliance will require the following:

Phase 1:

Within 90 days after the execution of this order, develop and submit a plan, for Departmental approval, of a complete investigation of the site and its affected areas, including a time schedule of actions.

Phase 2:

Execute the Departmental approved investigation in accordance with the time table set therein.

Phase 3:

Develop and submit a plan, for Departmental approval, for cleanup of those problem areas found during Phase 1, incorporating a time schedule of actions to be carried out.

Phase 4:

Execute the Departmental approved cleanup plan in accordance with the time table set therein.

II.

To be hereby notified that Respondent's refusal to comply with this ORDER, and the provisions herein, will subject the Respondents to possible enforcement procedures under Section 1073 of the Act which could result in the assessment of civil penalties in an amount not to exceed $50,000 for each day of continued non-compliance.

III.

To be further notified that the Department expects the RESPONDENTS TO COMMUNICATE AND COOPERATE WITH EACH OTHER in formulating and executing this ORDER. The Department will use its full authority to compel all responsible parties to contribute their fair share towards the development of, and execution of, the provisions of this ORDER. Full compliance by one or more parties with the terms of this ORDER will not excuse non-compliance by other responsible parties, and such failure to comply with this ORDER shall be deemed to be a continuing violation.

This COMPLIANCE ORDER is effective on date of issuance.

DONE AT BATON ROUGE, LOUISIANA, THIS 6th DAY OF AUGUST, 1986.

/s/_____

Patricia L. Norton, Secretary
Department of Environmental Quality

All correspondence should be addressed to:

Department of Environmental Quality
Inactive and Abandoned Sites Division
Mr. William B. De Ville, Administrator
P. O. Box 44307
Baton Rouge, Louisiana 70804
Telephone: (504) 342-8925